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In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA ex. rel. Don H. Haycock,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

Should this court reverse the trial and appellate court rulings that approves an unlawful labor-charging practice of Hughes Aircraft Company, to which there is no legal support, and which violates federal regulations to which both petitioner's (relator's) expert and Hughes Aircraft Company experts agree are exclusive and mandatory.

Also, is the due process clause of the Fifth Amendment violated when the district court awards attorney fees and costs based on their approval of this unlawful labor-charging practice without a requested hearing and without any evidence or legal authority to support this ruling.

LIST OF PARTIES

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 6, 1996 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on December 6, 1996 (*see* App. 1 and 2). Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS FEDERAL STATUTES AND FEDERAL REGULATIONS INVOLVED

Constitutional Provisions

U.S. Constitution, Amendment V

No person shall be . . . deprived of . . . property without due process of law . . .

Statutes

31 USC 3729 False Claims

(a) *Liability for certain acts.* Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government;

* * *

is liable to the United States Government for a civil penalty of not less that $5,000 and not more that $10,000

plus 3 times the amount of damages which the Government sustains because of the act of that person . . .

31 USC 3730 Civil Actions for False Claim

(b) *Actions by private persons.* A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government . . .

* * *

(c)(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.

* * *

(d)(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

10 USC 2306 Truth in Negotiations

(f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractors knowledge and belief, the cost or pricing data submitted was accurate, complete and current:

(A) before the award of any prime contract under this chapter [10 USC 2301] entered into after using procedures other than sealed bid procedures . . .

(B) before the pricing of any contract change or modification . . .

(C) . . .

(D) . . .

Regulations

48 Code of Federal Regulations Chapter I Part 52.230-4
(CAS Clause 52-230-4)

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this contract, the contractor shall take the steps outlined in (a) through (f) below:

(a) Submit to the cognizant Contracting Officer a description of any accounting change, the potential impact of the change on contracts containing a CAS clause, and if not obviously immaterial, a general dollar magnitude cost impact analysis of the change which displaces the potential shift of costs between CAS-covered contracts by contract type . . .

(b) submit a cost impact proposal in the form and manner specified by the cognizant Contracting Officer within 60 days after the date of determination of the adequacy and compliance of a change submitted pursuant to (a) above. If the above proposal is not submitted within the specified time . . . an amount not to exceed 10 percent of each payment made after that date may be withheld until such time as a proposal has been provided in the form and manner specified by the cognizant Contracting Officer.

(c) agree to appropriate contract and subcontract amendments . . .

(d) . . .

(e) Notify the Contracting Officer in writing of any adjustments required to subcontracts . . .

4 Code of Federal Regulations, Chapter III, Sub-Chapter G

COST ACCOUNTING STANDARDS – CONSISTENCY IN ESTIMATING, ACCUMULATING AND REPORTING COSTS

Part 401.20 Purpose. The purpose of this Cost Accounting Standard is to insure that each contractor's practices used in estimating costs for a proposal are consistent with costs accounting practices used by him in accumulating and reporting costs. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike. With respect to individual contracts, the consistent application of cost accounting practices will facilitate the preparation of reliable cost estimates used in pricing a proposal and their comparison with the costs of performance of the resulting contract. Such comparisons provide one important basis for financial control over costs during contract performance and aid in establishing accountability for costs in the manner agreed to by both parties at the time of contracting. The comparisons also provide an improved basis for evaluating estimating capabilities.

Part 401.40 Fundamental Requirements.

(a) A contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting cost.

(b) A contractors cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating costs in pricing the related proposal.

(c) . . .

Part 401.50 Techniques for Application. . . . costs estimated for proposal purposes shall be presented in such a manner and in such detail that any significant cost can be compared with the actual cost accumulated and reported therefor. In any event the cost accounting practices used in estimating costs in pricing a proposal and in accumulating and reporting costs on the resulting contract shall be consistent with respect to: (1) *The classification of elements or functions of cost as direct or indirect;* and, (3) the methods of allocating indirect costs to the contract. (italics added)

4 Code of Federal Regulations, Chapter III, Sub-Chapter C

Part 331.50 Contract Clause. . . . the clause set forth below shall be inserted in all negotiated national defense prime contracts and subcontracts.

* * *

(2) Follow consistently his cost accounting practices in accumulating and reporting contract performance cost data concerning this contract. If any change in cost accounting practices is made for purposes of any contract or subcontract subject to Cost Accounting Standards Board requirements, the change must be applied prospectively to this contract, and the Disclosure Statement must be amended accordingly. If the contract price or cost

allowance of this contract is affected by such changes, adjustments shall be made . . .

* * *

(4)(B) Negotiate with the contracting officer to determine the terms and conditions under which a change may be made to a cost accounting practice . . .

Part 351.120 Amendment of Disclosure Statement.

(a) Disclosure Statements must be amended when disclosed practices are changed to comply with new Cost Accounting Standards . . .

48 Code of Federal Regulations, Chapter I

Part 31.202 Direct Costs. (a) A direct cost is any cost that can be identified specifically with a particular final cost objective . . .

Part 31.203 Indirect Costs. (a) An indirect cost is any cost not directly identified with a single, final cost object, but identified with two or more final cost objectives or an intermediate cost objective. *It is not subject to treatment as a direct cost.* (italics added)

STATEMENT OF CASE

A. INTRODUCTION

This is a qui tam action brought against Hughes Aircraft Company for fraudulent labor charging practices in violation of the False Claim Act 31 USC 3129; and the Truth in Negotiations Act 10 USC 2306. This action charges Hughes with violating these federal statutes by knowingly charging the labor of overhead employees directly to contracts with the United States government

without complying with the mandated federal regulations identified herein.

The Hughes' Systems Engineering Laboratory, or SEL, is charged with this fraudulent labor charging from 1984 through 1987 wherein petitioner was employed as an Engineering Projects Manager and observed these fraudulent practices. During this period SEL had approximately 650 employees that provided technical support to other Hughes organization directly responsible for performing contracts for the United States government. The labor of substantially all of these employees, including employees with overhead job classifications, was charged directly to these contracts as direct costs.

This fraudulent labor-charging was accomplished in two ways.

One way, by overhead employees being indiscriminately directed by management to charge their labor directly to government contracts in violation of Hughes expressed labor charging practice. The Hughes "Attendance and Labor Reporting" manual imposes strict procedures to ensure that only authorized employees charge their labor directly to government contracts. This includes prior written authorization directing these employees to charge their labor to specific accounts on these contracts; and, theirs and their supervisors certification that their labor was charged to those specific accounts in accordance with this authorization.

The second way, by overhead labor being charged to a direct-labor-allocation-system ("allocation system") that distributed the labor of these overhead employees directly to those government contracts comprising this allocation system.

Charging an employee's labor to the allocation system required that employee's job classification be re-classified from overhead labor to direct labor in accordance with these federal regulations. This re-classification is mandatory whether the labor-charging is by Hughes' expressed labor charging practice, or by the allocation system, as both Hughes and Petitioner's expert agree.

This strict control of overhead labor vis-a-vis labor directly charged to government contracts, or direct labor, is important because during this period – as Hughes has acknowledged – the government paid Hughes for employees charging their labor directly to government contracts an additional 165.518 to 174.950 percent over the actual cost of their labor. Of these percentages, 155.49 to 173.83 percent was to pay for the cost of overhead labor. This is the table Hughes provided:

	YEAR		
"MULTIPLIER" DESCRIPTION	1984	1985	1986
Labor Overhead			
Engineering	155.49%	143.09%	173.83%
Cost of Money			
CITE	.00316	.0026	.00166
Engineering	.31952	.24277	.21732
G&A Expenses	9.63	9.73	9.03
Profit**	N/A	N/A	N/A

**Profit is not a "multiplier" or burden that is added to direct labor costs.

Knowingly charging unauthorized overhead labor to the United States government as labor directly on government contracts has been held a fraud under the False Claim Act. *United States v. Uber* (6th Dist. 1962) 303 F.2d 462; *United States v. Dinerstein* (2nd Dist. 1960) 362 F.2d 852.

The trial court granted Hughes summary judgment, and awarded attorney fees and costs, based solely on a misinterpretation of the declarations of Hughes' experts. This misinterpretation resulted in both rejecting Hughes' failure to comply with these federal regulations; and, mistakenly concluding that the use of the government's approval of the allocation system and Item 2.50 in the disclosure statement justified Hughes' unlawful labor-charging practice. (*See* App. 5-13) The Hughes experts are Dudley P. Slater and Allan E. Brunmier. During this period Mr. Slater was the Resident Auditor at Hughes with the Defense Contract Audit Agency, he is now retired; Mr. Brunmier was a member of the Air Force Plant Representative Office and the Principal Contracting Officer, he is now a Hughes employee. Petitioner's expert, Peter Elliott, is an expert in this field as disclosed in his declaration.

The declarations of both Hughes' experts and petitioner's expert, Peter Elliott, concur that charging overhead labor directly to government contracts *must be in compliance with these mandated federal regulations.*

Both Slater's and Brunmier's declarations acknowledge the government's approval of the allocation system; and, describe and illustrate the procedure for re-classifying overhead employees to direct labor so their labor can be charged to the allocation system. Specifically, they

reveal "managers and secretaries" were re-classified in compliance with these federal regulations. Although generically correct. Brunmier's declaration identifies only five job-codes of technical managers and secretaries after December 1985 as confirmed by Elliott's declaration. Neither Brunmier's or Slater's declaration give blanket approval – or even allude – to Hughes' unlawful labor charging practice – contrary to what the Ninth Circuit courts concluded (Brunmier's declaration is at App. 37; Slater's at App. 64; and, Elliott's at App. 16)

Nonetheless, the trial court ruled that Item 2.50 of the Disclosure Statement entitled Hughes to charge the labor of any overhead employee directly to government contracts if Hughes independently and unilaterally concluded the labor of these individual employees "benefited" all the contracts to which their labor was charged. Item 2.50 is referred to in the trial court's ruling on App. 7 as page 71 of Brunmier's declaration, and is now App. 43 of Brunmier's declaration. It is as follows:

Item 2.50

> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts; but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

The trial court granted Hughes summary judgment and awarded attorney fees and costs under 31 USC 3730 based entirely on Slater's and Brunmier's declarations. However, this court only considered in its ruling the government's approval of the allocation system and Item

2.50 and did not address Hughes' fraudulent labor-charging in violation of its "Attendance and Labor Reporting" practice, which admittedly would have been irrelevant had this ruling been correct.

The appellate court summarily approved the trial court's ruling without any acknowledgment to the evidence, law or issues expressed in appellant's briefs, including mandatory compliance with these federal regulations and Hughes' failure to comply. From oral argument before the appellate panel it became evident that this court's ruling was based only on supposition and speculation that Brunmier and Slater knew and approved the Hughes unlawful practice. There is no evidence to support this conclusion.

B. ALL EXPERTS AGREE COMPLIANCE WITH THESE FEDERAL REGULATIONS IS THE ONLY LAWFUL WAY OVERHEAD LABOR CAN BE CHARGED DIRECTLY TO GOVERNMENT CONTRACTS

The declaration of experts Peter Elliott, Allan Brunmier and Dudley Slater all confirm that compliance with these Federal Regulations on both *mandatory* and *exclusively* the only lawful way overhead labor can be charged directly to government contracts. Specifically:

1. Prior notice to the government that the labor-hours of overhead employees, within specific job classifications will be charged directly to government contracts (60) days before a specific date, as mandated by 48 CFR, Ch. I, Part 52.230-4 (CAS Clause 52-230-4)

Elliott's declaration: App. 24

Slater's declaration: (paragraph no. 4) "After initial submission of a Disclosure Statement, each time the contractor changes an accounting practice, it is required to submit to the DCAA and AFPRO an amended Disclosure Statement at least 60 days before the effective date of the proposed change." (App. 66)

Brunmier's declaration: Exhibit F is prior notice to him from Slater to reclassify five job classifications of technical managers from overhead to direct so their labor could be charged directly to government contracts (App. 49). Exhibit H (App. 55) is Brunmier's response approving this reclassification form overhead to direct of these five classification of technical managers.

2. Filing with the government, each time the labor-hours of overhead employees are to be changed directly to government contracts, a CAS Disclosure Statement Amendment designating both the accounting change of the reclassification and its effective date, as mandated by Title 4 CFR, Ch. III, sub-chapter C, Part 331.50 (CAS Clause 331.50)

Elliott's declaration: App. 27

Brunmier's declaration: Revised Disclosure Statements to accounting changes of Hughes' Cost Accounting Standards show compliance with this Federal Regulations, as represented by Exhibits B2, B3, C, G and H of Brunmier's declaration (App. 44, 45, 46, 53 and 55 respectively)

Slater's declaration: (paragraph no. 4) "Once the amended CAS Disclosure Statement

is timely submitted to the government the proposed changed may be effected even before the contractor receives official approval for the change." (App. 66)

3. Filing with the government a cost impact study of the cost impact on each government contract affected by the accounting change, as mandated by 48 CFR, Ch. I Part 52.230-4 (CAS Clause 52-230-4)

Elliott's declaration: App. 23, 24, 25, 28, 29 and 30

Brunmier's declaration: (paragraph 12) "In connection with this review [of Disclosure Statement], my office analyzed the expected cost impact of the proposed changes to determine whether the changes would increase the cost to the government of Hughes' contract performance." (App. 40)

Slater's declaration: (paragraph no. 10) "Also in connection with my review of the EDSG's allocation system, my office analyzed the [cost] impact of having various levels of lab managers, assistant lab managers and their secretaries across EDSG charge their time into a pool [allocation system] . . . " (App. 69)

4. Reclassifying Hughes employees by job codes from overhead to direct – and not as *individual* employees as was the unlawful Hughes practice. This is mandated by Item 3.1.0 of Hughes Disclosure Statements and the declaration of Hughes Controller Paul Hendricks

Elliott's declaration: App. 33

Paul Hendricks' declaration: (paragraph no. 5) " . . . Item 3.1.0 of the EDSG's Disclosure Statement . . . maintained: Cost classification

guides lists [of] individual job classifications and titles, and indicated whether the job is classified as direct or indirect." (not in appendix)

Brunmier's declaration: Exhibit F is for five job codes of technical managers that Slater requested be reclassified direct labor (App. 49) Exhibit D, para. 4 (App. 47) is the Disclosure Statement amendment for re-classifying secretaries so their labor can lawfully be changed to the allocation system.

Slater's declaration: (paragraphs 6, 7, 8 and 10, App. 59 and 60) "The allocation system at issue during these discussions involved the charging of time of lab managers and their secretaries into the direct pool [allocation system]. In connection with my own analysis of the EDSG lab managers and secretaries who were planned to be placed on the allocation system, . . . "

C. THE HUGHES' UNLAWFUL LABOR-CHARGING PRACTICE

This practice is described in the declaration of Hughes Controller, Robert Meyers. (App. 57) Particularly significant is his declaration that *no notice* was given the government by Hughes unilaterally re-allocating the labor of *individual* overhead employees directly to government contracts. Specifically:

Paragraph No. 10 (App. 60). "No employee within any EDSG division could charge his or her time to the allocation system unless he or she had been formally authorized by the division controller to do so, . . . "

> Paragraph No. 11 (App. 61). "Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system . . . This determination was made based upon a review of each employee's job classification, function and assignments."
>
> Paragraph No. 14 (App. 62). "The program managers generally disclosed the name runs on a periodic basis to the customers, including the government. This provided the customers with knowledge as to which employees were charging to the contract both directly, as well as through the allocation system."

As Peter Elliott's critique of Mr. Meyers declaration reveals, this practice violates every mandated federal regulations for reallocating overhead labor directly to government contracts. Specifically:

1. 48 CFR, Ch. 1 Part 52-230-4 (FAR Clause 52-230-4) is violated because there is no notice to the government of Hughes request to charge the labor of specific job codes of overhead employees directly to government contracts.

2. 4 CFR, Ch. III, Subchapter C, Part 331.50 and Part 351.120 (FAR CAS Clauses 331.50 and 351.120) are violated because there is no CAS Disclosure Statement Amendment designating the accounting change to reallocate the labor of these overhead employees directly to government contracts, and the date this reallocation is to become effective.

3. FAR CAS Clauses 52-230-4 is further violated because no cost impact study was performed of the cost

impact to affected government contract comprising the allocation system.

4. 4 CFR, Ch. III, Subchapter G, Parts 401.20, 401.40 and 401.50 (FAR Clauses 401.20, 401.40 and 401.50) are violated because Hughes' practices of estimating costs for a proposals *are not* consistent with the cost accounting practices used in accumulating and reporting of costs.

5. Hughes violated Item 3.1.0 of its CAS Disclosure Statement with the government by reallocating the overhead labor of *individual employees* and not by the *job classifications* of overhead employees as mandated by Hughes' Disclosure Statement.

D. HUGHES ACKNOWLEDGED NON-COMPLIANCE WITH THESE FEDERAL REGULATIONS.

Because the labor of five job codes of technical managers and secretaries after December 1985 were re-allocated directly to government contracts in compliance with these federal regulations, Hughes has claimed this generically in all its pleadings and briefs as "managers and secretaries." Hughes makes no claim, nor do its experts Brunmier and Slater, that the labor of other overhead employees in other job classifications was reallocated directly to government contracts in compliance with these Federal Regulations.

However, the labor of substantially all other overhead employees were charged directly to government contracts. To explain, Hughes contends that compliance with these Federal Regulations was not necessary because Item 2.50 the Cost Accounting Disclosure Statements approved by the government were sufficiently broad,

standing alone, that they could independently – and even without any notice to the government – reallocate overhead labor directly to government contracts. Hughes relies totally on one clause of its disclosure statement, Item 2.50 (App. 43, Exhibit C of Brunmier Declaration)

It is Hughes contention that Item 2.50:

> " . . . put the government on notice that . . . SEL . . . would allocate" those labor charges of any employee Hughes decided *benefited* those government contracts that comprised the allocation system." (Hughes' Statement of Uncontroverted Facts)

Also, Hughes re-affirmed this contention in oral argument before the appellate panel on September 14, 1995:

> "JUDGE NELSON: Mr. Haycock had two nails up there, one of them labelled secretaries and the other labelled managers. He would have driven them into the lectern making the point that the only thing that was covered was managers and secretaries. What's the short answer to those nails?
>
> "MR. GALLAGHER (Hughes Attorney): The short answer is that the language of 2.5.0 says direct pools will be utilized by persons whose labor changes are impractical to individually charge to specific contracts but which clearly benefit same. It doesn't say anything about managers or secretaries. In fact, the declarations of Mr. Slater and Mr. Brunmier both say that the language covers all of the supervisory, managerial, secretarial and other support personnel. People other than engineers who were out actually designing . . . " (Page 19 of the transcript of

the oral argument before the panel on September 14, 1995.)

THIS STATEMENT IS NOT TRUE. Brunmier's and Slater's declarations only approve, " . . . *the use of direct allocation pools* for charging the time of [Hughes' employees]" as the trial court correctly stated in its summary judgment order and order awarding attorney fees. These declarations *do not* approve the Hughes' unlawful labor-charging practice. Mistakenly the trial court did approve Hughes' unlawful practice by incorrectly concluding Item 2.50 alone gave Hughes this right.

Since this overhead labor was charged directly to those government contracts, it was subject to the 165.518 to 174.950 percent burden on direct labor.

E. TRIAL COURT FAILED TO CONSIDER AND RULE ON THE UNLAWFULNESS OF HUGHES' LABOR-CHARGING PRACTICE

Both the trial court's summary judgment order and its order for attorney fees and costs was based entirely on the declarations of Brunmier and Slater (App. 37 and 64 respectively). This reliance is expressed in these orders (App. 5 and 8). This court mistakenly only addressed the issue of whether the government approved the allocation system; and, finding it did concluded that Item 2.50 entitled Hughes to engage in its unlawful labor-charging practice. By this erroneous conclusion, this court mistakenly attributed to Brunmier and Slater approval of this practice. This conclusion *was not* in their declarations.

The introductory paragraphs of these orders acknowledge these declarations as the single authority for these orders, and then concluded each order as follows:

Summary Judgement Order

" . . . the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pool for charging the time of *managers, supervisors, secretaries, and other support personnel.* Slater Decl. paras 6,7,8,10. &11; Brunmier Decl. para 13(c), (d); Defendant's reply of Jan. 19,1994 at pp. 24-29. . . . And, the most important document language – that which is set forth in Hughes' Disclosure Statements – is clearly not limited in the way Plaintiff suggests, e.g. Brunmier decl. at p. 71. [Item 2.50] The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' Direct allocation pool cost charging system."

Order Awarding Attorney Fees

"As this court found, both of such declarants testified under oath that, during the 1983 through 1987 timeframe at issue in the complaint, there was full disclosure, discussion, consideration, and approval of the use of the direct allocation pools for charging the time of *managers, supervisors, secretaries, and other support personnel.*"

> "As this Court found in granting Hughes' motion for summary judgment, the declarations of the then-cognizant government officials showed conclusively that Haycock's allegations had no merit and "the record is thus uncontroverted that the government had no complaints, was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system"

In both orders the court correctly interprets Brunmier's and Slater's declarations as providing only the:

> " . . . approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,* and *other support personnel.*"

This court then went on to mistakenly conclude that Item 2.50 was the single vehicle for implementing the " . . . use of direct allocations pools . . . " Since this was the Hughes unlawful practice, both orders approved the Hughes' unlawful labor-charging practice.

Neither Brunmier nor Slater state, or even intimate, that Item 2.50 is this vehicle. Both declarations mandate that compliance with these Federal Regulations is the *only* vehicle for charging the labor of overhead employees directly to Government contracts. Further, there is no indication in either of these declarations that Brunmier and Slater even were aware of the Hughes unlawful practice and it provided no notice to them.

In denying petitioner's motion for re-consideration, the trial court acknowledged, and rejected, the claim that the unlawful practice violated mandated Federal Regulations. This is evident from the following statement in its order denying reconsideration:

> "The motion for reconsideration is predicated on the declaration from Relator's expert vis-a-vis the substantive issues of whether Hughes violated the False Claims Act. The declaration is presented for the first time. Its substance consists mostly of the evidence already presented to this court, and interpretation thereof concluding that Hughes violated the False Claim Act." Rejection of this claim was also acknowledged in the trial court's summary judgment order.

Contrary to what the trial court concluded and ruled, there is no dispute between petitioner's expert Peter Elliott and Hughes' experts Dudley P. Slater and Allan E. Brunmier that compliance with these federal regulations is both *mandatory* and *exclusive*.

F. THE APPELLATE COURT RULINGS WERE BASED ON SPECULATIONS AND SUPPOSITIONS THAT BRUNMIER AND SLATER KNEW AND APPROVED THE HUGHES' UNLAWFUL LABOR-CHARGING PRACTICE

The appellate court summarily adopted the trial courts orders without any discussion or reference to the evidence, to the law or to the issues presented in petitioner's briefs (App. 2).

However, oral argument before the appellate panel reveals their mistaken conclusion that Brunmier and Slater both knew and approved Hughes unlawful practice.

> JUDGE NELSON: (To Mr. Gallagher, Hughes attorney) "I take it that the accounting

standard contemplated some downstream exercise of discretion as to whether John Manager fit within this change or not."

MR. GALLAGHER: That's correct.

This position is further indicated by JUDGE KLEINFELD'S questions indicating his mis-interpretation of the declarations of: Brunmier, Slater and Elliott:

JUDGE KLEINFELD: There's part of your brief I didn't really understand. I was looking for exactly what the lie was that Hughes Aircraft allegedly told to the Government, under the truth and negotiations act and the false claims act, and I couldn't figure it out. As far as I can tell, you thought that some employees should have been on direct billing instead of – or should have been on overhead instead of having their time billed directly. But the Government said, no, Hughes told us what they were doing and we approved it. I don't understand what the false claim is.

MR. HAYCOCK: I don't understand. I don't believe the Government said that. I don't think the government took any position in this at all. To my knowledge, they didn't. I will get to that issue as I go through what I have to offer this morning for there is a misrepresentation as to the federal regulations under which these charges have been made.

JUDGE KLEINFELD: Well, I understood it went a little beyond that. That this fellow Allan Brunmier was hired by the Government to look over the accounting and he thought it was okay the way Hughes did it.

MR. HAYCOCK: No. Mr. Brunmier is an employee of Hughes Aircraft Company. At the time of this period, that this complaint arose, he was the principal contracting officer representing the Government.

JUDGE KLEINFELD: And he says he determined that the accounting system was in accord with Government accounting practices and would not have an adverse cost impact on the Government.

MR. HAYCOCK: That's not what he said. What he said was that Hughes had complied with these provisions, these FAR [CAS] provisions, which I've covered quite thoroughly in my briefs and I won't go into. But basically it has to do with when an accounting change is made there has to be notification of the change. Supposed to be 60 days in advance, supposed to be a cost impact statement, and there's supposed to be an amended disclosure statement. That's what's required and that is not in dispute. My witnesses and Hughes' expert witnesses agree on that. That is required.

Now Mr. Brunmier, what he said in his declaration is that Hughes complied with these FAR regulations as to managers and secretaries. If you read his declarations, the reference is made to managers and secretaries.

Going further, if you go in to these declarations that are filed by the experts of Hughes Aircraft Company, Mr. Brunmier, Mr. Slater and Mr. Hendricks [Hughes' Controller] in their declarations they talk specifically about managers and secretaries. And there is no dispute that, in a broad sense, managers and secretaries can charge to these accounts because they were

approved according to these FAR [CAS] Regulations. Hughes' made a specific request for five classifications of technical managers, and you have to make these [requests] by job classification . . . The Government approved it.

Hughes filed a cost impact statement. That's in Mr. Brunmier's declaration. Hughes filed an amended disclosure statement. They were approved according to these FAR regulations.

The same with secretaries. Hughes acknowledges that after December 1986, Hughes did the same thing. This is all in the briefs. They notified the Government, they filed a cost impact study, and they filed an amended return [disclosure statement].

So we don't dispute that these people could properly charge directly to government contracts. . . . in Hughes' motion to [for] summary judgment, in their statements of undisputed facts and conclusions of law, and it their . . . summary judgment order, all specified managers and secretaries. These other people weren't mentioned.

JUDGE KLEINFELD: Is there some evidence in the record to counter the Brunmier declaration?

MR. HAYCOCK: Well, there's the declaration of my expert. The Brunmier declaration is not really contested. It's saying that declaration supports this position. If you take managers and secretaries in a broad sense, that's accurate. That's accurate because he states what the law is.

Mr. Slater, the former DCAA auditor, he states exactly what it is. His declaration and my

expert's declaration are mirror images. Mr. Hendrick's declarations is not contested . . .

Brunmier's and Slater's Declarations *do not* approve the Hughes' unlawful labor-charging practice. Also, Brunmier, Slater and Elliott all concur that compliance with mandated Federal Regulations is required to re-allocate overhead labor directly to Government contracts. The Hughes practice does not do this and there is no authority to support it.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED TO CORRECT THE LOWER COURTS ABUSE OF DISCRETION IN GRANTING HUGHES SUMMARY JUDGMENT AND ATTORNEY FEES AND COSTS

The trial court abused its discretion in granting Hughes motion for summary judgment and attorney fees and costs; the appellate court abused its discretion by summarily affirming the trial court's ruling without reference or consideration of the evidence and mandatory Federal Regulations for re-allocation overhead labor directly to Government contracts. (*see* App. 2 to 13)

Granting Hughes summary judgment and awarding attorneys' fees and costs should be reviewed by the abuse of discretion standards as to whether the lower courts committed and error of *law* and/or of *fact*. *Barber v. Hawaii* (9th Cir. 1994) 42 F.3d 1185; 1189; *United States v. McConney* (9th Cir. 1984) 782 F.2d 1195, 1201; Appellate Court's ruling (*see* App. 3).

A court abuses its discretion by making an erroneous interpretation of the law. *Hunt v. National Broadcasting Co., Inc.* (9th Cir. 1989) 872 F.2d 289, 292. "The district court may abuse its discretion several ways. First, the court abused its discretion if it did not apply the correct legal standard . . . " *Hunt*, supra, p. 292.

Abuse of discretion occurs when the lower courts rest its decisions on a clearly erroneous finding of fact. *Zepeda v. United States I.N.S.* (9th Cir. 1983) 753 F.2d 719, 725.

The lower courts made the following erroneous rulings of *law* and *facts*:

1. The trial judge *incorrectly* concluded that the Hughes labor-charging practice was proper, and Hughes need not comply with the mandated Federal Regulations in re-allocating overhead labor directly to Government contracts – contrary to the declarations of their own experts. Specifically, that the declarations of Slater and Brunmier *alone* authorized Hughes to unilaterally, and without compliance with mandated Federal Regulations charge the time of "*managers, supervisors, secretaries,* and other *support personnel.*" (*see* App. 7)

2. By the trial judge *incorrectly* concluding that Hughes was not required to provide the Government with: prior notice of accounting changes; cost impact analyses; and, CAS Disclosure Statement Amendments, as required by mandated Federal Regulations.

3. By the trial judge *incorrectly* concluding that Hughes was making "full disclosure" of its labor-charging practices to Brunmier and Slater, the then Government officials. Their declarations do not provide any

expressed or implied indication that they were even aware of the unlawful Hughes labor-charging practice and this practice *does not* include notification of it to them. (*See* Robert Meyers declaration, App. 62 para. 14)

Lower courts' summary judgment rulings may be set aside if its order is *opaque and unilluminating* as to either the relevant facts or law with respect to the merits of appellant's claim. *Carter v. Stanton* (1972) 405 U.S. 669, 671. It is the district court's duty to specify what facts are established, and if it fails to do so, all of the issues as framed by the pleadings are open for trial. *Hartman v. American News Co.* (7th Cir. 1948) 171 F.2d 581, 584, certiorari denied (1949) 337 U.S. 707 [69 S.Ct. 1989]. Summary Judgement should be denied unless the moving party can establish the facts on which he is entitled to summary judgment *under applicable principles of substantive law. Bloomgarden v. Cover* (CA DC 1973) 479 F.2d 201, 206; *Koepke v. Fontecchio* (9th Cir. 1949) 177 F.2d 125, 127. The moving party has the burden of affirmatively demonstrating that the responding cannot prevail *as a matter of law.* This is true because the burden to show there is not a genuine issue of material fact rests on the party moving for summary judgment. *Doff v. Brunswick Corp.* (9th Cir. 1966) 372 F.2d 801, 813, Certiorari denied 1967) 389 U.S. 820 [88 S.Ct. 39].

The trial court violated congressional enactments of Federal Law by disregarding mandated Federal Regulations in its rulings of summary judgment and awarding attorney fees and costs. The appellate court further rejecting these enactments by summarily affirming the trial court's rulings without any reference or consideration of these mandated Federal Regulations. By granting this

writ these enactments will be properly interpreted and enforced to carry-out the intent of congress; and, inform Government contractors that arbitrarily charging overhead labor directly to government contracts violates Federal Laws that will be enforced by the courts.

B. CERTIORARI SHOULD BE GRANTED SO DAMAGES MAY BE PROVED UNDER THE RELEVANT STATUTES

The trial court's summary judgment rulings denied the Government the right to prove damages under: 31 USC 3729 False Claims: 31 USC 3730 Civil Actions for False Claims; and, 10 USC 2306 Truth in Negotiations. As presented herein, the trial court's summary judgment order was an abuse of discretion both as to the *facts* and applicable *law*. The Government has the right to have this judgment reversed and prove damages resulting from this unlawful labor-charging practice.

C. CERTIORARI SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S MIS-INTERPRETATION AND MIS-APPLICATION OF FEDERAL REGULATIONS

The Ninth Circuit courts' approval of the unlawful labor-charging practice is totally without any legal basis. This ruling is an invitation to present and potential Government contractors to engage in this unlawful labor-charging practice because the Ninth Circuit has approved it. If not now, the time will clearly come when these rulings must be reversed to comply with mandated Federal Regulations – as both Petitioner's and Hughes'

experts concur. Petitioner urges that the time for this action is now rather than later when the U.S. Government has suffered further, and considerable, monetary damages from this unlawful labor-charging practice.

D. THE CERTIORARI SHOULD BE GRANTED BECAUSE THE AWARD OF ATTORNEY FEES AND COSTS VIOLATED THE DUE PROCESS PROVISION OF THE FIFTH AMENDMENT

The Due Process provision of the Fifth Amendment limits the actions of the Federal Government that would deprive persons of "life, liberty or property" *Robinson v. Fauver* (D.N.J. 1996) 932 F.Supp. 639. Due Process under the Fifth Amendment are flexible and depend upon circumstances of a given case but require, at minimum, some kind of notice and hearing before final deprivation of property interest. *Tri-County Industries, Inc. v. District of Columbia* (DC 1996) 932 F.Supp. 4.

On April 22, 1994 Petitioner filed with the District Court "Request for Oral Argument on Defendant's Motion to Tax Attorney Fees." (Petitioner's Excerpts of Record No.126, page 396) This motion was denied.

A person has been denied Due Process when there is no evidence to support taking his liberty, *Thompson v. City of Louisville* (1960) 362 U.S. 199; 80 S.Ct. 624; 4 L.Ed. 2d 654.

Petitioner submits that he was denied Due Process by the Trial Court denial of his request for a hearing. Also, he was denied Due Process by the Trial Court awarding attorney fees and costs on a mistaken understanding of

what the evidence proved. Specifically, that this court's approval of Hughes' unlawful labor-charging was error because there is no basis in the evidence on which court relied to support such a conclusion. The Fifth Amendment does not make any evidentiary distinction between the deprivation of "property" and "liberty."

The petitioner was denied due process under the Fifth Amendment by being deprived of property without due process of law in the court's award of attorney fees and costs.

CONCLUSION

Because the Ninth Circuit have disregarded mandated Federal Regulations in approving an unlawful labor-charging of Hughes Aircraft Company, the writ should be granted to reverse the summary judgment ruling and award of attorney fees and costs. This case should be remanded back to the District Court for trial on the issue of damages suffered by the Government by this unlawful labor-charging practice.

Respectfully submitted,

DON H. HAYCOCK,
Petitioner and Relator on behalf of
the United States Government

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., DON H. HAYCOCK, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 94-55620 94-55826 D.C. No. CV-90-01977-KN ORDER (Filed Dec. 6, 1996)

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.*

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., DON H. HAYCOCK, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 94-55620 94-55826 D.C. No. CV-90-01977-KN MEMORANDUM* (Filed Oct. 6, 1996)

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Judge, Presiding

Argued and Submitted September 15, 1995
Pasadena, California

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.**

After reviewing the record *de novo*, *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994), we conclude that Haycock presented no evidence of fraud or

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

false statement. We are unable to identify, in the evidence submitted, fraudulent allocations of employees to the direct as opposed to the indirect categories, double billing, or fraudulent accounting practices. Nor can we identify a cost accounting standard which Appellee was required to follow and did not follow. There is no evidence in the record which we have been able to find to show that Appellee improperly classified any indirect costs as direct costs, or overcharged for any of the fringe benefits and other entitlements associated with waiver costs. Whatever may have been arguable was disclosed to and approved by the government, so far as the evidence in the record shows.

Nor is there any evidence in the record to show a false certification under the Truth in Negotiations Act, 10 U.S.C. § 2306a(a), or false statement of cost or pricing data. 10 U.S.C. § 2306a(a)(2).

The district judge had discretion to award attorney's fees if it found that the relator's claim was "clearly frivolous," 31 U.S.C. § 3730(d)(4), and it did. This standard is met if "the plaintiff continued to litigate after" his claim "clearly became" groundless or without foundation. *Hughes v. Rowe*, 449 U.S. 5, 15 (1980). Our review of the attorneys' fees award is limited by the abuse of discretion standard. *In re Washington Public Power Supply System*, 19 F.3d 1291, 1296-97 (9th Cir. 1994). The district court was within its discretion in awarding attorneys' fees, as it did, for the period after Hughes served on the relator declarations of the relevant government officials showing that the cost allocation system was known to, and approved by, the government.

The district court's denial of his motion for reconsideration of the attorneys' fees award is reviewed for abuse of discretion. *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994). The court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped litigating after the disclosures which showed absence of fraud or false statement.

Appellee's request for attorneys' fees on appeal is denied. *See* Fed. R. App. P. 38; *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 11[illegible]5, (9th Cir. 1991) (attorneys fees not awarded where appeal not "clearly meritless").

AFFIRMED.

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of America *ex rel* Don H. Haycock, Plaintiff, v. Hughes Aircraft Company, Defendant.	CV 90-1977 KN ORDER Re: Motion to Dismiss and Motions for Summary Judgment (Filed Mar. 4, 1994)

Based on the papers submitted, the Court rules as follows:

1. The Court does not decide Defendant's motion to dismiss portions of the Second Amended Complaint ("SAC") based on the statute of limitations because Plaintiff's underlying claims lack merit and therefore, as discussed below, granting Defendant's motion for summary judgment disposes of this case.

* * *

2. Plaintiff's motion for summary judgment is **DENIED.** The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence, and in form they fail to comply with the Federal and Local Civil Rules. The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by

independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

3. Defendant's motion for summary judgment is **GRANTED**. In addition to adopting the vast majority of Defendant's Statement of Uncontroverted Facts and conclusions of Law, and signing Defendant's proposed Order granting summary judgment (with one paragraph excepted), the Court adds the following observations:

> The crux of Plaintiff's dispute with Defendant's theory of the case appears to be that any disclosure by Hughes and/or approval by the government of using the allocation system of
>
> * * *
>
> Charging certain labor costs was limited to a small number of specific categories of technical managers and therefore did not include any other supervisory or manager-level employees or their secretaries. Such a reading of the record may be understandable if one looks only at certain documents (and for this reason the Court does not find it appropriate to impose sanctions against Plaintiff).[2] Nevertheless, other than

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[2] For example, in a letter of August 24, 1983, Hughes' controller wrote to the government mentioning the reclassification of "assistant, associate and laboratory and department managers." Brunmier Decl. I at 65. Mr. Slater's Report of April 25, 1984, and Mr. Brunmier's memo of May 10, 1984, also both referred only to reclassification of specific

Plaintiff's unsupported assertions to the contrary, the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,*and other *support personnel.* Slater Decl. ¶¶6, 7, 8, 10, & 11; Brunmier Decl., ¶13(c), (d); Defendant's Reply of January 19, 1994 at pp. 24-29. Plaintiff has offered no evidence to contradict or question the testimony of these declarants (nor, apparently, has Plaintiff deposed them). And, the most important document language – that which is set forth in Hughes' Disclosure Statements – is clearly not limited in the way Plaintiff suggests. *E.g.* Brunmier Decl. at p. 71. [Item 2.50] The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system.

IT IS SO ORDERED.

DATED: March 4, 1994

/s/ David V. Kenyon
DAVID V. KENYON
UNITED STATES
DISTRICT JUDGE

---

categories of managers. *Id.* at 184, 188. And, no explicit mention of secretarial time was made until the December, 1986 Disclosure Statement. *Id.* at 173.

APPENDIX 4

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Attorneys for Defendant,
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) (kas) ~~[PROPOSED]~~ ORDER GRANTING MOTION FOR AWARD OF ATTORNEYS' FEES PURSUANT TO 31 U.S.C. § 3730(d)(4), FED. R. CIV. P. 11 AND LOCAL RULE 16.10 (Filed May 9, 1994)

On April 7, 1994, defendant Hughes Aircraft Company ("Hughes") filed its Motion for Award of Attorneys' Fees Pursuant to 31 U.S.C. § 3730(d)(4), Fed. R. Civ. P. 11 and Local Rule 16.10.

BASED ON THE PAPERS SUBMITTED, THE COURT RULES as follows:

FACTS

Relator, Don H. Haycock, filed a *qui tam* lawsuit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, against Hughes in April 1990. After the original and a first amended complaint were dismissed on Hughes' motion for lack of particularity under Rule 9(b), Haycock filed a Second Amended Complaint in October 1992. In his complaint, Haycock alleged that Hughes violated the False Claims Act by charging the labor hours of certain employees working in Hughes' Systems Engineering Laboratory ("SEL") of the Electro-Optical and Data Systems Group ("EDSG") in a manner that was inconsistent with what Hughes had disclosed to the government in its CAS Disclosure Statements during the period from 1983 through 1987.

During discovery, Haycock testified that prior to filing his lawsuit, he had never read Hughes' CAS Disclosure Statements, was unaware of what Hughes had disclosed to the government pertaining to the method of labor charging for SEL employees and was uninvolved in Hughes' determination of which SEL employees should charge directly to contracts and which should charge to indirect accounts. During discovery, it became clear that Haycock had not even been aware of the use by SEL employees of an "allocation system" of timecharging, whereby the employees charged all of their labor time to one account number, which was then spread by a computerized algorithm across a predetermined base of contracts benefited by the labor efforts of such employees. Toward the end of discovery, Haycock stated in a letter to Hughes' counsel that, if what the Hughes' witnesses had been saying in their depositions was true – that the

government was aware of the method of timecharging to direct accounts through an allocation system used in the SEL and had approved that system – then he would have no case and would have to "fold". In reliance on that representation, although Haycock had never requested such documents from Hughes, Hughes voluntarily provided to Haycock its CAS Disclosure Statements for the relevant timeframe and the government's approval letters, which showed that the timecharging method of charging certain employees' time directly to contracts through an allocation system had been disclosed to and approved by the government.

Even after receiving the documentary evidence proving that Haycock's allegations were without merit, Haycock refused to drop his case and, instead, on December 20, 1993, filed a summary judgment motion in support of which he provided no admissible evidence whatsoever. Also on December 20, 1993, Hughes served on Haycock its motion for summary judgment, together with accompanying declarations and exhibits, which included a declaration of the former Resident Auditor of the Defense Contract Audit Agency with cognizance over the accounting and timecharging practices at issue in Haycock's complaint and a declaration of the former Principal Administrative Contracting Officer ("PACO") of the Air Force Plant Representative Office, who had responsibility for ensuring that Hughes was properly charging its labor costs in compliance with the applicable cost standards and adequately disclosing its charging policies. Attached as exhibits to the PACO's declaration were the approval letters he had sent to Hughes in 1984 pertaining to Hughes timecharging practices, as disclosed in its CAS

Disclosure Statements for 1983 (which timecharging practices relevant to the issues in the case at bar remained largely unchanged during the rest of the 1980's).

As this Court found, both of such declarants testified under oath that, during the 1983 through 1987 timeframe at issue in the complaint, "there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,* and other *support personnel.*" (Court Order Re: Motion to Dismiss and Motions for Summary Judgment, Case No. CV 90-1977 KN, entered March 8, 1994, p. 4 ("Court Order").)

Notwithstanding the declarations of the then-cognizant government officials showing definitively that Hughes had disclosed the allocation system at issue in the complaint to the government and had received the government's approval for using that system of timecharging throughout the EDSG, Haycock refused to dismiss his case. Thereafter, Haycock's conduct in continuing the litigation, which was clearly for no other purpose than to harass Hughes, forced Hughes to expend significant resources in defending itself, including responding to Haycock's wholly unsupported summary judgment and to his equally meritless opposition to Hughes' motion for summary judgment, appearing at a hearing on a discovery motion brought by Haycock at which Haycock inexplicably failed to appear, and preparing and filing statutorily-required pretrial documents in preparation for the pretrial conference that was scheduled to take place shortly after the Court took the parties' summary judgment papers under submission.

As this Court found in granting Hughes' motion for summary judgment, the declarations of the then-cognizant government officials showed conclusively that Haycock's allegations had no merit and that "the record in thus uncontroverted that the government had no complaints, was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system." (Court Order, p. 5.)

DISCUSSION

By the present motion, Hughes seeks to recover its attorneys fees and costs expended in defending this lawsuit since December 20, 1993 (the date of service of the declarations of the individuals who were the then-cognizant government officials) on the grounds that Haycock's continuance of the litigation and refusal to dismiss his case, despite the fact that he clearly had no evidence to support his allegations or controvert the sworn testimony of the then-cognizant government officials, was done for no purpose other than to harass Hughes. As of that date, it was evident that Haycock's lawsuit was clearly frivolous, clearly vexatious and clearly maintained for purposes of harassment. As such, Hughes is entitled to recovery of its attorneys fees and costs pursuant to 31 U.S.C. § 3730(d)(4) ~~and Federal Rule of Civil Procedure 11.~~ Kas (*United States ex rel. Herbert v. National Academy of Sciences*, 1992 U.S. Dist. LEXIS 14063 (D.D.C. 1992); *Davis v. Mason County*, 927 F. 2d 1473, 1488 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 275, 116 L.Ed. 2d 227 (1991).)

CONCLUSION

For all of the foregoing reasons, the Court HEREBY GRANTS Hughes' Motion for Attorneys' Fees. Hughes is hereby awarded $ 146,754.59 in attorneys' fees and expenses.

Dated: MAY -9 1994

/s/ DAVID V. KENYON
United States
District Judge

Presented by:
McKenna & Cuneo
JAMES J. GALLAGHER
FRED D. HEATHER
SUSAN B. MYERS
DANA F. GARDNER

By: /s/ Susan B. Myers
Susan B. Myers

APPENDIX 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 90-1977 Kn **Date** June 1, 1994

Title United States, ex rel. Donald H. Haycock v. Hughes Aircraft Company

DOCKET ENTRY

PRESENT:

HON. DAVID V. KENYON, **JUDGE**

Lenora Pulliam	None
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	**None**

PROCEEDINGS:

IN CHAMBERS:

The Court has received Relator Haycock's motion for reconsideration of the Court's Order awarding attorneys fees to Defendant Hughes. The motion for reconsideration is predicated on a declaration from Relator's expert vis-a-vis the substantive issues of whether Hughes violated the False Claims Act. The declaration is presented for the first time. Its substance consists mostly of a review of the evidence already presented to this Court, and an interpretation thereof concluding that Hughes violated the False Claims Act.

The Court has already ruled – based on the only evidence timely submitted – that Relator failed to prove that there were any False Claims Act violations. The Court also found that the Defendant was entitled to attorneys fees beginning at the time it was made clear to Relator that no violations had occurred.

At this point, the Court is not inclined to reconsider either earlier ruling based on this so-called "new" evidence. Enough attorney time has already been expended litigating this case. If Relator thinks this Court has erred in its determinations, he is free to appeal. Accordingly, the Court will not require Hughes to file an opposition to Relator's reconsideration motion, which the Court hereby **DENIES**.

IT IS SO ORDERED.

APPENDIX 6

Don H. Haycock,
Attorney at Law
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Los Angeles, CA 90045

ON BEHALF OF, AND FOR , PLAINTIFF
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

EX REL. DON H. HAYCOCK UNITED STATES OF AMERICA Plaintiff, vs, HUGHES AIRCRAFT COMPANY Defendant.	NO. 90 1977 KN(TX) DECLARATION OF EXPERT WITNESS PETER ELLIOTT

I, PETER ELLIOTT, declare as follows: I make this declaration on behalf of the Relator in this lawsuit, Don H. Haycock, with whom I have consulted and advised regarding the time charging practices of defendant Hughes Aircraft Company ("HUGHES") and agreed to offer the following testimony at the trial of this lawsuit, should that have occurred.

I make this declaration as an expert in the field of government contracting, and particularly with regard to government regulations of cost accounting standards, requirements and violations. My qualifications as an

expert in this field is presented in part A, The Experience, Training and Education of Peter Elliott.

I have personal knowledge of the Federal Regulations and Requirements that I have applied to the facts disclosed in the documents that I have relied upon, and as disclosed to me by Relator, both as referenced herein. I can competently testify under oath of the conclusions I have made herein based upon these facts.

A.

THE EXPERIENCE, TRAINING AND EDUCATION OF PETER ELLIOTT

PETER ELLIOTT, CPA, is President/Senior Executive Accountant, with Peter Elliott Accountancy Corporation (PEAC), Inc. and also President of Government Contracts Advisory and Litigation Support Services Corporation (GCALSS). PEAC is a firm which provides accounting, auditing, and tax services, and specialized consulting services in Government contracts, grants and terminations. These services are designed to assist clients in resolving contractual disputes and termination problems, and in improving client's accounting systems consistent with Federal contract, grant, regulations and cost accounting standards requirements.

Mr. Elliott's prior affiliations as a Consultant include Contracts Advisory Services, Astro Vista Inc., and with the Department of Government Contracts of Peat, Marwick, Mitchell & Co. in the Los Angeles office. His principle area of assistance relating to management and accounting systems include (1) preparation of proposals, (2) preparation and negotiation of cost and insurance

claims, (3) accounting records reconstruction, and (4) determination of allowable costs against contracts and grants, including development of rates for indirect cost recovery in accordance with various government agencies regulations.

During his career Mr. Elliott has had diverse experience such as: Industrial Engineering Assistant; Computer Programer [sic]; Military Pilot; Military Aircraft and Engine Mechanic; Auditor, Public; Auditor, Government; owner of an accounting firm providing a full spectrum of service including tax and auditing services.

His most recent experience over and above the usual proposals, terminations, systems and accounting matters are Board of Contract Appeals Cases, including Value Engineering, Equal Access to Justice Act, Equitable Adjustment of Contracts, and commercial litigation support. He has been qualified and appeared as an expert witness before the Armed Services Board of Contract Appeals and the California Superior Court and has been qualified as an expert witness before the Federal District Court of Los Angeles.

Mr. Elliott received his BS in Accounting from California State Polytechnic College, an AA in Mathematics and Science from Chaffey College, and has done post graduate work in Business Finance at the California State University, Fullerton. He is a Certified Public Accountant in California and a member of the California Society of Certified Public Accountants, the American Institute of Certified Public Accountants, and the National Contract Management Association.

B.

INFORMATIONAL SOURCES

Following are the factual and authoritative sources of information on which I have relied in making my evaluations and conclusions stated in this declaration:

1. Declarations of Allan E. Brunmier. Mr. Brunmier states that he was a member of the Air Force Plant Representative Office ("AFPRO"), the governmental agency primarily responsible for the administration of government contracts from 1967 to 1986. During this period he states that he had cognizance over the Hughes facilities located in El Segundo, California, which include the time charging practices of the organization challenged in this lawsuit, the Systems Engineering Laboratory ("SEL"). In 1982 he states that he became the Principal Administrative Contracting Officer (PACO) with responsibility for overseeing all the contract administrative functions of the AFPRO, including pricing, business management and contract administration. This included the Electro-Optical and Data Systems Group, the parent of the SEL. He is now an employee of Hughes.

Mr. Brunmier provided two declarations, one on December 20, 1993 and one on January 13, 1994. In his December 20, 1993 declaration he provided the chronology of the notices, correspondence and cost impact analyses performed by Hughes pursuant to the Amendments Hughes made to the Cost Accounting Standards ("CAS") Disclosure Statements ("Disclosure Statements") from October 1983 through to December 1986. (However, it is noted that in 1986 Mr. Brunmier declares that he left government service and started working for Rockwell

International, Inc.) This includes relevant dates when Hughes informed the government of Disclosure Statement Amendments and the required Cost Impact Proposals Hughes submitted, or when then should have been submitted, under FAR clause 52.230-4, *Administration of Cost Accounting Standards* (1984 through 1987), the applicable FAR clauses during this period from October 1983 through to December 1987. The FAR Clause 52-230-4 was revised in 1992 and these provisions were incorporated in FAR Clause 52-230-4 without any changes to these requirements. The pertinent portions of FAR Clauses of 52.230-4 that were in effect from October 1983 through December 1987 are presented on App. 26 herein. The April 1984 Revision did not change these requirements from the revision in effect in October 1983.

Mr. Brunmier's December 20, 1993 declaration will be referenced throughout this declaration.

2. Declaration of Hughes Employee Robert Meyers. From 1979 to 1986 Mr. Meyers states he was the Division Controller of two Hughes Divisions, both within EDSG. In this capacity he managed the finance departments of these divisions, one being the parent division to the SEL.

3. Declaration of Dudley P. Slater. From 1983 until 1988 Mr. Slater states that he was assigned to the Defense Contract Audit Agency ("DCAA") office of Hughes as Resident Auditor with cognizance over all audit functions. From 1983 to 1985 he had specific responsibility of EDSG, the parent organization of the organization which is the subject of this lawsuit, the SEL.

4. The Following Representations of Relator.

(a). That from November 1984, or before, secretaries time in the SEL was being charged to allocated direct via a computerized system that Hughes refers to as the "allocation system."

(b). That in the last quarter of 1984 and beyond the time of indirect SEL employees, other than secretaries and technical laboratory and department managers, was also being charged to allocated direct via the "allocation system."

(c). That from the first part of 1984 the time of non-technical department managers in the SEL was being charged to allocated direct via the "allocation system."

5. Government Laws and Regulations

(1). 31 U.S.C. 3730 *The False Claims Act*

(2). FAR Paragraph 30.401 (CAS 401) *Cost Accounting Standard – Consistency in Estimating, Accumulating and Reporting Costs*

(3). FAR Paragraph 30.401.20 (CAS 401.20) *Purpose*

(4). FAR Paragraph 30.401.40 (CAS 401.40) *Fundamental requirements*

(5). FAR Paragraph 30.401.50 (CAS 401.50) *Techniques for application*

(6). FAR Clause 52-230-4 (1984-1987 Revisions) *ADMINISTRATION OF COST ACCOUNTING STANDARDS*

(7). Title 4, *Code of Federal Regulations.* Chapter III, General Accounting Office (CASB), January 1, 1983 Rev.

(a). Para. 331.50 *Contract Clause – Cost Accounting Standards*

(b). Para. 331.71 *Materiality*

(c). Para. 351.130 *Instructions and information*

C.

GOVERNMENT REGULATIONS AND REQUIREMENTS FOR COMPLIANT ACCOUNTING OF CONTRACT COSTS

1. Hughes Knew How to Effect Accounting Changes. An important issue is whether the time charging practice of certain Hughes employees in the SEL from 1983 through to 1987 resulted in the violation of FAR Paragraph 30.401 (or preceding regulation) *"Cost Accounting Standards – consistency in estimating, accumulating and reporting costs."* And, if so, was it done intentionally and what liability does this impose?

The time charging practice involved charging the time of formally indirect employees to "allocated direct" via the "allocation system" which included a data base made up of contracts in which some of the SEL employees were properly authorized to charge direct. The expressed criteria for selecting these contracts to which the indirect SEL employees time would be charged as "allocated direct" was, " . . . the totality of the contracts to which employees supervised by the lab managers charged their time." (*See* Declaration of Robert Meyers, App. 60 para 9)

Hughes claims the practice of redistributing indirect labor to "allocated direct" was disclosed by a CAS Disclosure Statement Amendment of October 31, 1983 and

that this disclosure was sufficiently broad to authorize an allocation based on the " . . . labor distribution of supervised individuals." The disclosure is as follows: (Item No. 2.5.0 of Disclosure Statement Amendment of October 31, 1983)

> "Y. Other
>
> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals." (Brunmier's declaration, Appendix 7 Exhibit B1, page App. 43.)

Hughes also submitted a Cost Impact Proposal (statement) to the government, for its review and acceptance, which included in this "allocation system" only five specific job classifications of technical laboratory and department managers. On April 25, 1984 the Defense Contract Audit Agency ("DCAA") reviewed this cost impact statement (*See* Brunmier's declaration, Appendix 7, Exhibit F page App. 49). On May 10, 1984 the Principal Administrative Officer also accepted this cost impact statement (*See* Brunmier's Declaration, Appendix 7, Exhibit H pages App. 55 & 56)

Clearly, Hughes knew the FAR regulations for implementing accounting changes to its CAS covered contracts. Particularly, that a Cost Impact Proposal is required and must be reviewed and accepted by the government representative responsible for Hughes contracting activities. As presented, this is mandated by FAR Clause 52-230-4, which would have been included in all CAS covered contracts in 1983 to 1987:

"52-230-4 Administration of Cost Accounting Standards.

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this contract, the Contractor shall take the steps outlined in (a) through (f) below:

(a). Submit to the cognizant Contracting Officer a description of any accounting change, the potential impact of the change on contracts containing a CAS clause, and if not obviously immaterial, a general dollar magnitude cost impact analysis of the change which displaces the potential shift of costs between CAS-covered contracts by contract type (i.e. firm-fixed-price, incentive, cost-plus-fixed-fee, etc.) and other contractor business activity. As related to CAS-covered contracts, the analysis should display the potential impact of funds of the various Agencies/Departments (i.e., Department of Energy, National Aeronautics and Space Administration, Army, Navy, Air Force, other Department of Defense, other Government) as follows:

(b). Submit a cost impact proposal in the form and manner specified by the cognizant Contracting Officer within 60 days (or such other date as may be mutually agreed to) after the date of determination of the adequacy and compliance of a change submitted pursuant to (a) above. If the above proposal is not submitted within the specified time, or any extension granted by the cognizant Contracting Officer, an amount not to exceed 10 percent of each payment made after that date may be withheld until such time as a proposal has been provided in the form and manner specified by the cognizant Contracting Officer."

It has been revealed that three of Hughes time charging practices changes violated this provision by not submitting to the government a Cost Impact Proposal when these additional indirect employees were reclassified "allocated direct" and included in the "allocation system."

The cost effect of not notifying the government of changes in accounting practices, and providing a Cost Impact Proposal, is that an inconsistency is created in the way costs are estimated, and the way actual costs are accumulated and reported. This is the expressed purpose of FAR Paragraph 30.401, which states as its purpose;

"401.20 Purpose

> The purpose for this Cost Accounting Standard is to insure that each contractor's practices used in estimating cost for a proposal are consistent with cost accounting practices used by him in accumulating and reporting costs. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike . . . "

A Contractor violates FAR CAS 401 when he proposes estimated costs as indirect and then, without informing the government, by the prescribed notice, cost impact and Disclosure Statement Amendment, he accumulates and reports those costs as direct costs. This causes inaccuracies in the pricing and costing processes that the requirements of FAR CAS 401.40 would preclude:

"401.40 Fundamental Requirement

(a) A contractor's practice used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs.

(b) A contractor's cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating in pricing the related proposal.

(c) . . . "

FAR CAS 401.50 describes how this requirement of consistency of costs shall be applied:

"401.50 Techniques for Application.

(a) . . . costs estimated for proposal purposes shall be presented in such a manner and in such detail that any significant cost can be compared with the actual cost accumulated and reported therefore. In any event the cost accounting practices in estimating costs in pricing a proposal and in accumulating and reporting costs on the resulting contract shall be consistent with respect to:

(1) The classification of elements or functions of cost as direct or indirect;

(2) the indirect cost pool to which each element or function of cost is charged or proposed to be charged; and,

(3) the method of allocating indirect costs to the contract."

If an accounting change is made that affects how costs are estimated, and how they are accumulated and

reported, the change must be applied *prospectively* to the affected contract and an equitable adjustment negotiated for each affected contract (4 *Code of Federal Regulations*, Chapter III, para. 331.50(a)(4), (1983 Rev.)

Therefore, the issue is whether or not Hughes violated FAR CAS, Part 401 by charging the time of indirect employees to "allocated direct", without following the prescribed procedure and an analyses of the cost impact to each affected contract, as mandated by FAR clause 52-230-4,

D.

THE TIME OF FIVE CLASSIFICATIONS OF INDIRECT TECHNICAL MANAGERS WAS PROPERLY CHARGED TO ALLOCATED INDIRECT

On October 4, 1983 Hughes submitted an amended Disclosure Statement Amendment for the Electro-Optical and Data Systems Group ("EDSG") Engineering Divisions dated October 31, 1983 (Brunmier's declaration, Appendix 7 Exhibits B2, B3 and F pages App. 44, 45 and 49 respectively). This Amendment included an accounting change that incorporated reclassifying five (5) specific Job Codes of technical laboratory and department managers so their time could be charged to "allocated direct," specifically:

Job Code	Title/Description
21823	Manager Technical Department
11002	Assistant Manager, Tech. Dept.
12428	Associate Manager, Tech. Dept.
11008	Assistant Manager, Tech. Lab.
12457	Associate Manager, Tech. lab.

A Cost Impact Proposal (statement) was provided, and on April 25, 1984 (Exhibit F of Brunmier's Declaration, page App. 49) there was a response from the office of the Resident Auditor, Dudley P. Slater, accepting the cost impact analyses; and, the reclassification from indirect to direct of the five job codes of laboratory and department technical managers. After the effective date of the Disclosure Statement Amendment the time charges of the managers having one of these job code classifications could properly and lawfully be charged to "allocated direct" via the "allocation system." This acceptance did not extend to any other employees. Although the government accepted the Cost Impact Proposal (statement) six months after submittal of the Disclosure Statement Amendment the date relates back to the date of the Disclosure Statement Amendment of October 31, 1983. Hughes notified the government, provided a cost impact statement and a Disclosure Statement Amendment.

This Amendment, for reclassifying these technical manager "allocated direct," is as follows: (Disclosure Statement Amendment of October 31, 1983, Item 2.50)

"Y. Other

A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, both which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals."

E.

THERE WAS NO RECLASSIFICATION OF INDIRECT NON-TECHNICAL MANAGERS FOR THEIR TIME TO BE CHARGED TO ALLOCATED DIRECT

The government's response to the Cost Impact Proposal (statement) of April 25, 1984, referenced in D, above, makes no reference to non-technical laboratory or department managers and secretaries being included with the specific five classifications of technical managers (Appendix 7, Exhibit H of Brunmier's Declaration page App. 55). There is no cost impact analyses (statement) or any indication the government has even been notified, with the exception of secretaries on December 30, 1985, of their reclassification to "allocated direct". For any of these non-technical managers to charge their time to the "allocation system" would be contrary to the requirements of the Cost Accounting Standards.

Hughes cannot slip them in under the CAS Disclosure Statement Amendment just because it is claimed that it is broad enough to include them. 4 *Code of Federal Regulations,* Chapter III, para. 351.130 (1983 Rev.) clearly prohibits this:

> "351.130 Instructions and Information.
>
> (c) The disclosure of a cost accounting practice by a contractor does not determine the allowability of particular items of cost. Irrespective of the practices disclosed by a contractor, the question of whether or not, or the extent to which, a specific element of cost is allowed under a contract remains for consideration in each specific instance. Contractors are cautioned that the determination of the allowability of cost

> items will remain a responsibility of the contracting officers pursuant to the provisions of the applicable procurement regulations."

The August 24, 1983 letter recitation of T.L. Dougherty, Controller (Appendix 7 Exhibit B3 of Brunmier's Declaration page App. 45) that these non-technical managers are included in the "allocation system" is not material since there was no Cost Impact Proposal (statement) submitted to the government identifying the cost impact of their inclusion (*See* 52-230-4 Administration of Cost Accounting Standard herein.) Also, the same recitation of Allan E. Brunmier in his letter of May 10, 1984 (Appendix 7 Exhibit H of Brunmier's Declaration page App. 55) is equally not material and can only be a mistaken assumption by him that they were included. Since Hughes had previously submitted the Cost Impact Proposals (statement) for five job classifications of technical managers and later secretaries, that the DCAA Auditors accepted, Hughes and their employees knew the required practice for reclassifying employees to "allocated direct" in order to charge their time via the "allocation system." They were to treat the reclassification of indirect non-technical managers as an accounting change. It was an accounting change since these non-technical managers were now being charged direct. Further, they now are estimated as indirect while their actual costs were being accumulated and reported as direct.

When a contractor is fully covered by Cost Accounting Standards, a Contracting Officer cannot by edict conclude there is no cost impact without a cost impact analyses (statement). Every accounting change requires a Disclosure Statement Amendment that documents the

date that the accounting change, for which it was prepared, is to become effective; and should describe the accounting change. Hughes did prepare and submit a Disclosure Statement Amendment incorporating technical managers (by job classification) and secretaries with cost impact statements. This practice should have been followed for each job classification and every individual that was reclassified to the "allocated direct" category or classification.. Hughes was reclassifying employees to "allocated direct" based only on an arbitrary determination by the Division Controllers that it was authorized by an employee's " . . . job classification, function and assignment." Without a cost impact analyses for each of these reclassification the practice is contrary to Cost Accounting Standards under government regulations relating to cost estimating. (*See* Appendix 8 para. 11 of Robert Meyers' Declaration at page App. 61) I am skeptical that this procedure is authorized in the Hughes practices on time-charging as Mr. Meyer states in his declaration. (Appendix 8 of his Declaration at page App. 57)

Without a Disclosure Statement Amendment and a cost impact analyses, changes in the classification of non-technical managers from indirect to direct in order for them to charge their time direct to contract via the "allocation system" violates Cost Accounting Standards.

F.

THE CHARGING OF SECRETARIES' TIME FROM INDIRECT TO ALLOCATED DIRECT UP TO DECEMBER 30, 1985 WAS IMPROPER

On August 28, 1986 Hughes submitted by letter a Disclosure Statement, dated December 30, 1985, to amend

the CAS Disclosure Statement, dated October 1, 1984, to reclassify secretaries from indirect to direct so their time could be charged to "allocated direct" via the "allocation system" (Brunmier's declaration, Appendix 7 Exhibit D page App. 47) This reclassification was not indicated in the October 31, 1983 Disclosure Statement or in the October 1, 1984 Disclosure Statement. This Amendment is as follows: (Disclosure Statement Amendment dated December 30, 1985, Item No. 2.5.0)

> "Y. Other
>
> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The accounts collect actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals. Secretaries reporting to individuals who are direct will also be classified direct."

The above referenced letter of August 28, 1986 makes the following statement regarding a Cost Impact Proposal (statement):

> "The cost impact statement for the changes was submitted December 1985." (For the December 30, 1985 Disclosure Statement Revision)

However, if the time of secretaries was already being charged to "allocated direct" via the "allocation system" prior to the effective date of this Disclosure Statement Amendment of December 30, 1985, this would be a violation of the Cost Accounting Standards if during this

period there had been no disclosed accounting change related to the secretarial job classifications.

G.

THE MOST OBVIOUS VIOLATION OF FAR CAS 401 IS ROBERT MEYERS' ADMISSION OF RECLASSIFYING EMPLOYEES FROM INDIRECT TO DIRECT IN ORDER TO CHARGE THEIR TIME VIA THE "ALLOCATION SYSTEM"

Mr. Meyers acknowledges in his declaration (Appendix 8, page App. 57) that it was the duty of the division controller to "formally authorize" employees to change their classification from indirect to "allocated direct" and charge their time to contract direct via the "allocation system." (Appendix 8, para. 10 page App. 60) Mr. Meyers further states in his declaration:

> "11. Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system and the supervised employees over which the supervisor's time would be allocated. This determination was made based upon a review of each employee's job classification, function and assignment. Pursuant to EDSG practices, authorized lab managers and their secretaries were eligible to be on the allocation system." (Appendix 8, page App. 61)

By this practice it appears the EDSG division controllers were arbitrarily reclassifying indirect employees, to "allocated direct" for inclusion in the "allocation system," based on considerations other than the disclosed job classifications. There is no Disclosure Statement Amendment

that identifies this practice and there has been no identified Disclosure Statement made to the government for such an accounting change which we are aware. Also, the government should not approve such broad discretion, since each job classification would have to be identified (as they had previously disclosed) before being reclassified under the provisions of FAR Contract Clause 52-230-4. This practice could result in a cost impact to each of the CAS Covered contracts each of these indirect employee, that was reclassified from indirect to "allocated direct," and charged time "allocated direct" via the "allocation system." As presented above, FAR CAS 401 prohibits this change without a Disclosure Statement Revision and a cost impact analyses. The cost for these indirect employees cannot be estimated as indirect, then during the performance periods of these contracts arbitrarily reclassified direct so actual costs will be accumulated and reported as if they were direct employees. Under the above stated FAR Paragraphs and Clauses, and other regulations discussed above, there should have been both a cost impact analyses, and a Disclosure Statement revision effective on the date of the job classification change from indirect to direct for each of these employees. It appears that the Cost Accounting Standards requirements and the cost impact analyses were not satisfied, as indicated by 4 *Code of Federal Regulations,* Chapter III, para. 331.71. (1983 Rev.)

"331.71 Materiality

(3) The relationship between a cost item and a cost objective. Direct cost items, especially if the amounts are themselves part of a base for

allocation of indirect, will normally have more impact than the same amount of indirect costs."

Contract indirect costs are generally determined by multiplying the number of estimated Direct Labor Dollars by an overhead or burden rate, thereby giving a sufficient estimate to cover the overhead. Clearly, it could be to Hughes advantage to exchange indirect labor for direct labor, as in the reclassification to "allocated direct." was doing with the correct mix of cost-type and fixed-price contracts.

As presented above, the only job classifications disclosed for charging to "allocated direct" via the "allocation system" are those five specific classifications of technical managers after October 31, 1983 and their secretaries after December 30, 1985. Any Hughes practices permitting the divisions controller to randomly assign employees to the "allocation system;" or, authorize other than the five job classifications and their secretaries to charge direct labor via the "allocation system" is in violation of FAR CAS 401.

H.

CONCLUSION

Based on the information provided me, it is my opinion that the United States government would be entitled to assess damages under 31 U.S.C. The False Claims Act for:

(a). The cost impact of the SEL secretaries charging direct via the "allocation system" prior to December 30, 1985;

(b). The cost impact of non-technical indirect SEL laboratory and department managers charging direct via the "allocation system;"

(c). The cost impact of all indirect job classifications whose time was charged to allocated direct at the direction of the Division Controllers, which has not been disclosed to the government.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT, AND FURTHER DECLARE THAT THIS DECLARATION WAS EXECUTED ON MAY 31, 1994 IN SANTA ANA, CALIFORNIA.

/s/ Peter Elliott
PETER ELLIOTT

APPENDIX 7

JAMES J. GALLAGHER
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Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF ALLAN E. BRUNMIER SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT

I, Allan E. Brunmier, declare as follows:

1. I make this Declaration on behalf of Hughes Aircraft Company ("Hughes"). I have personal knowledge of the following and if necessary could testify competently thereto.

2. I was a member of the Air Force Plant Representative Office ("AFPRO"), the governmental agency

assigned primary responsibility for the administration of government contracts, from 1967 to 1986. Throughout this time, I had cognizance over the Hughes Aircraft Company facilities located in El Segundo, California, which are at issue in this suit.

3. From 1967 to 1975, I served in the Pricing Branch of the AFPRO at Hughes El Segundo, as a price analyst; at that time, my duties included reviewing Hughes' contract proposals. From 1975 to 1982, I served in the Business Management Branch of the AFPRO at Hughes El Segundo, and was responsible for reviewing and negotiating Hughes' forward pricing and final overhead rates and costs. The Defense Contract Audit Agency ("DCAA") provided audit support for those functions. During the latter part of that timeframe, I was promoted to the Branch Chief of the AFPRO Business Management Branch.

4. In 1982, I was promoted to be the Chief of the Contract Administration Division of the AFPRO at Hughes El Segundo and the Principal Administrative Contracting Officer ("PACO"). As the PACO, I was responsible for overseeing all of the contract administrative functions of the AFPRO, including pricing, business management and contract administration. In this capacity, I had cognizance over several business units of Hughes, including the Electro-Optical and Data Systems Group ("EDSG").

5. In 1986, I left government service and accepted a position with Rockwell International, Inc. I held that position until 1991 when I accepted my current position

as Senior Government Accounting Specialist for Hughes Aircraft Company.

6. In November, 1982, Hughes submitted to my office Cost Accounting Standards Disclosure Statements ("Disclosure Statements") for the EDSG's Manufacturing Division, Engineering Division and the group home office. The EDSG Manufacturing Division Disclosure Statement disclosed, *inter alia*, a new accounting practice pursuant to which various direct labor pools would be maintained to collect labor charges, including supervision labor, to be distributed on the basis of the labor distribution of supervised employees. The concept and practice of such supervisory "allocation pools" were subsequently adopted (as of October 1983) in the EDSG Engineering Division. This accounting treatment was also incorporated into the consolidated EDSG CAS Disclosure Statement issued on October 1, 1984.

7. Attached hereto as Exhibit A is a true and correct copy of the EDSG Manufacturing Division CAS Disclosure Statement, dated January 3, 1983.

8. Attached hereto as Exhibit B is a true and correct copy of portions of the EDSG Engineering Division CAS Disclosure Statement, dated October 31, 1983.

9. Attached hereto as Exhibit C is a true and correct copy of the EDSG CAS Disclosure Statement dated October 1, 1984.

10. Attached hereto as Exhibit D is a true and correct copy of the portions of the EDSG CAS Disclosure Statement, dated December 30, 1985.

11. Attached hereto as Exhibit E is a true and correct copy of portions of the EDSG CAS Disclosure Statement, dated December 29, 1986.

12. As required by the Cost Accounting Standards ("CAS"), my office reviewed these Disclosure Statements to determine whether the accounting practices disclosed therein were: (1) adequately described in the Disclosure Statements, and (2) compliant with the Cost Accounting Standards. In connection with this review, my office analyzed the expected cost impact of the proposed changes, to determine whether the changes would increase cost to the government of Hughes' contract performance.

13. In connection with my review of the Disclosure Statements' adequacy and compliance with the Cost Accounting Standards, I determined as follows:

(a.) that the direct allocation pool practice disclosed was consistent with CAS 418, which provides for the designation of so-called "blanket costs," defined as costs that are accumulated in intermediate "cost pools" and then reallocated to contracts as direct costs;

(b.) that the direct allocation pool practice disclosed was consistent with the AFPRO's preference that costs be charged directly to contracts, rather than indirectly, wherever administratively feasible;

(c.) that the direct allocation pool practice disclosed would increase the accuracy of time-charging by supervisors, lab managers and their secretaries, because it would fairly allocate the labor costs of these employees across the totality of the contracts benefited, in direct

proportion to the charges to each contract made by the supervised employees;

(d.) that the direct allocation pool practice disclosed would improve the consistency of timecharging, because it would eliminate the arbitrary exercise of judgment of individual managers and secretaries as to whether particular tasks were properly charged as "direct" or "indirect" costs; and

(e.) that the direct allocation pool practice disclosed would not have any adverse cost impact on the government.

14. On April 25, 1984, the DCAA transmitted to my office its Report on Adequacy and Compliance Review of Disclosure Statement Revision ("Report") for the October 31, 1983 EDSG Engineering Division CAS Disclosure Statement, which set forth the DCAA's findings that the disclosed accounting practice changes regarding the implementation of the allocation pool system were adequately disclosed and compliant with the Cost Accounting Standards. A true and correct copy of the DCAA's Report, dated April 25, 1984, is attached hereto as Exhibit F.

15. On May 1, 1984, I issued to Hughes a letter which formally approved the accounting practice changes disclosed in the three November 1982 EDSG CAS Disclosure Statements. This letter reflected my finding that the accounting practices disclosed in the CAS Disclosure Statements, which had been implemented as of January 3, 1983, were adequately disclosed and complied with the Cost Accounting Standards. A true and correct copy of

my approval letter, dated May 1, 1984, to Hughes is attached hereto as Exhibit G.

16. On May 10, 1984, I issued to Hughes a letter which formally approved the accounting practice changes disclosed in the October 31, 1983 EDSG Engineering Division CAS Disclosure Statement. This letter reflected my finding that the accounting practices disclosed in that CAS Disclosure Statement, which had been implemented as of October 31, 1983, were adequately disclosed and complied with the Cost Accounting Standards. A true and correct copy of my approval letter, dated May 10, 1984, to Hughes is attached hereto as Exhibit H.

17. Throughout my tenure as the PACO, I continued routinely to approve Disclosure Statements submitted by Hughes that included a description of direct allocation pools, such as described above.

18. Disclosure of the allocation practice used by EDSG in the EDSG CAS Disclosure Statements precludes a Truth in Negotiations Act (defective pricing) violation with respect to the use of that practice, since the practice was adequately disclosed and complied with the Cost Accounting Standards.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 17 day of December, 1993 at Los Angeles, California.

/s/ Allan E. Brunmier
ALLAN E. BRUNMIER

(Exhibit B1 of Brunmier's Declaration)

Exhibit B1

Revised
Date 31 October 1983

COST ACCOUNTING STANDARDS BOARD DISCLOSURE STATEMENT *REQUIRED BY PUBLIC LAW 91-379*

CONTINUATION SHEET
Page 5a of 40 Pages

Name of Reporting Unit
EDSG – Engineering Divisions

Item No.	Item Description
2.5.0 Contd.	Y. Other

A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

(Exhibit B2 of Brunmier's Declaration)

Exhibit B2

HUGHES AIRCRAFT COMPANY-

4 October 1983

SUBJECT: Cost Accounting Standards Disclosure Statement

TO: Air Force Plant Representative
Hughes Aircraft Company
Attn: (TM) A. Brunmier (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits the attached Disclosure Statement Amendment for the EDSG – Engineering Divisions, dated 31 October 1983.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the Government's agreement to treat each and every Disclosure Statement as confidential information (4 CFR 351.40(d)). Further, it is requested that the information be protected and not released outside the Government as provided for in DAR 3-1203(f).

HUGHES AIRCRAFT COMPANY

/s/ Paul L. Hendricks, Jr.
P. L. Hendricks, Jr., Manager
Government Accounting

TCR:smh

Attachment: a/s

cc: D. Slater

(Exhibit B3 of Brunmier's Declaration)

Exhibit B3

(213) 616-1375 **HUGHES**

HUGHES AIRCRAFT COMPANY

ELECTRO-OPTICAL & DATA SYSTEMS GROUP
PO BOX 902
EL SEGUNDO CA 90245

24 August 1983

In reply refer to: 7011.83/F007

Subject: Electro-Optical & Data Systems Group
Engineering Burden Center CASB Disclosure Statement for 31 October 1983.

To: Mr. Allan E. Brunmier
Air Force Plant Representative's Office
Hughes Aircraft Company
P.O. Box 92463
Building C2, Mail Station C140
El Segundo, California 90245

As we discussed earlier, the EDSG Engineering Burden Center disclosure statement now incorporates the following minor accounting change. (See attachment 1).

Effective 31 October 1983, assistant, associate and laboratory and department managers will be reclassified as direct employees. Their labor dollars will be allocated based on the direct hours charged of those employees directly under their supervision. This change will provide a more proper costing of direct supervision to the benefitting activity. Attachment 2 is a detailed analysis showing the immateriality of this change to existing contracts.

The EDSG Engineering Burden Center rates for 1983 and forward will be revised to incorporate this change by 1 September 1983.

Attachments

/s/ T. L. Dougherty
T. L. Dougherty, Controller
Electro-Optical & Data Systems Group

Exhibit C

HUGHES AIRCRAFT COMPANY

5 October 1984

SUBJECT: Cost Accounting Standards Disclosure Statement

TO: Air Force Plant Representative
Hughes Aircraft Company
Attention: (TM) A. Brunmier (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits a revised Disclosure Statement for Electro-Optical & Data Systems Group, dated 1 October 1984.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the confidential information (CFR 351.40(d)). Further, it is requested that

the information be protected and not released outside the Government as provided for in FAR 30.201.4.

This Disclosure Statement is a merger of EDSG Engineering, Manufacturing and Group Office Disclosure Statements.

HUGHES AIRCRAFT COMPANY

/s/ P. L. Hendricks, Jr.
P. L. Hendricks, Jr., Manager
Government Accounting

smh:TCR

Exhibit D

28 August 1986

HUGHES
AIRCRAFT COMPANY

Subsidiary of GM Hughes Electronics

SUBJECT: Cost Accounting Standards Disclosure Statement Electro-Optical and Data Systems Group

TO: Air Force Plant Representative
Hughes Aircraft Company
Attention: (TM) R. F. Kornmann (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits a Disclosure Statement Amendment for Electro-Optical and Data Systems Group, dated 30 December 1985.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the Government's agreement to treat each and every Disclosure Statement as confidential information (CFR 351.40(c). Further, it is requested that the information be protected and not released outside the Government as provided for in FAR 30.201-4.

This revision incorporates the following changes:

1. Update name change, year and date change.
2. Incorporates revisions to Section VII regarding pension costs, a corporate responsibility, as requested by the Corporate Administrative Contracting Officer, Mr. D. Sneed, who approved these changes on 14 January 1986.
3. The minimum dollar capitalization amount effective 1989 fiscal year.
4. Descriptions, allocation base and pools to be charged for certain functions as described in summary of Disclosure Statement changes.
5. Revision to base for allocating domestic and foreign selling costs.

The cost impact statement for the changes was submitted December 1985.

HUGHES AIRCRAFT COMPANY

/s/ D. G. Illegible
for P. L. Hendricks, Jr., Manager
Government Accounting

cc: D. P. Slater (DCAA)

(Exhibit F of Brunmier's Declaration)

Exhibit F

[SEAL]

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
EL SEGUNDO RESIDENT OFFICE
HUGHES AIRCRAFT COMPANY
200 N. SEPULVEDA BLVD (C2/C130)
EL SEGUNDO, CA 90245

IN REPLY REFER TO
4521

APR 25 1984

/TB/FH/daj
762.440/4A441203

SUBJECT: Report on Adequacy and Compliance Review of Disclosure Statement Revision
Effective 31 October 1983
Electro-Optical and Data Systems Group
Engineering Divisions
Hughes Aircraft Company
El Segundo, California
Audit Report No. 4521-4A441203

TO: Air Force Plant Representative Office, AFCMD (AFSC)
Attention: Mr. Allan E. Brunmier, Principal Administrative Contracting Officer (PACO)
Hughes Aircraft Company
El Segundo, CA 90245

1. Purpose and Scope.

a. The purpose of our review was to determine whether the subject revised Disclosure Statement effective 31 October 1983 adequately describes the cost

accounting practices which the contractor proposes to use in the performance of its Governments contracts. Concurrently, we reviewed the revised practices to determine whether they comply with applicable Cost Accounting Standards and DAR Section XV.

b. The review was performed in accordance with generally accepted auditing standards and included such tests of the contractor's data and records and such other auditing procedures we considered necessary in the circumstances. The requirements contained in Cost Accounting Standards Board Regulations, Part 351, as implemented by DAR 3-809(c)(5)(i) and (ii) and 3-1205(d)(1), were used as criteria in ascertaining the adequacy and compliance of the subject contractor's revisions.

2. Summary Evaluation.

a. The subject Disclosure Statement revision reflects the reclassification from indirect to direct of the following managerial employees:

Job Code	Title/Description
21823	Manager Technical Department
11002	Assistant Manager Technical Department
12428	Associate Manager Technical Department
11008	Assistant Manager Technical Laboratory
12457	Associate Manager Technical Laboratory

(Exhibit F of Brunmier's Declaration)

The labor costs of these employees will be distributed to cost objectives based on the labor hours charged to cost objectives by their subordinates.

This timekeeping practice implemented by EDSG as of 31 October 1983 has been in use by the major HAC Groups for some time. The purpose is to provide proper costing of direct supervision to the benefiting activities.

b. Adequacy. In our option, the subject revision adequately describes the contractor's cost accounting practices.

c. Compliance. Our review disclosed no instances of noncompliance with CAS or DAR Section XV in the cost accounting practices reflected in the revised Disclosure Statement.

d. Cost Impact. The contractor's cost impact statement indicated a net decrease of costs allocable to Government CAS covered contracts of $49,000. Based on our review of the impact statement and supporting data, we take no exception to the methodology and the base data used by the contractor in calculating the cost impact on CAS covered Government contracts.

e. Recommendation. The contractor advised that the EDSG's timekeeping instructions provide, or will provide, that managers whose labor costs are distributed to cost objectives on the basis of labor hours charged to cost objectives by their subordinates shall request to be removed from the time distribution system whenever their labor effort is primarily dedicated to a specific contract or a CITE project (e.g. IR&D project leader) for an extended period of time. Upon the termination of such

projects the employee shall request re-instatement in the time distribution system.

We recommend that EDSG be requested to furnish AFPRO/DCAA copies of the applicable written timekeeping practices.

f. This review was limited to ascertaining the adequacy and compliance of the subject revised Disclosure Statement. Accordingly, we express no opinion as to whether the revised disclosed practices are proper, approved or agreed to for pricing proposals, accumulating cost or reporting contract performance data.

3. Concluding Remark. Additional audit assistance will be furnished as required.

DEFENSE CONTRACT
AUDIT AGENCY

/s/ Timothy P. Baum
for DUDLEY P. SLATER, Resident
Auditor

Copy furnished
AFPRO CAS Monitor (L. Sabala)
DCAA – RST – CAS Monitor
– RAM B
– CAC Network

(Exhibit G of Brunmier's Declaration)

Exhibit G

DEPARTMENT OF THE AIR FORCE

DET 36, AF CONTRACT MGT DIV. AF PLANT REPRESENTATIVE OFC (AFSC)
HUGHES AIRCRAFT COMPANY, P.O. BOX 92463

[SEAL] LOS ANGELES, CA 90009

REPLY TO ATTN OF
TMO/Sabala/414-6454 1 May 1984

SUBJECT
Disclosure Statement Amendments – Voluntary Changes

RECEIVED

TO
Hughes Aircraft Company MAY 3 1984
Attn: Mr. J Stanley Crum
Vice President and Controller
El Segundo, CA 90245 GOVERNMENT ACCOUNTING

Pursuant to FAR Part 30, I have reviewed the following disclosure statement amendments:

	Date Submitted	Effective Date
Electro-Optical and Data Systems Group-Group Office	12 Nov 82	3 Jan 83
Electro-Optical and Data Systems Group-Engineering Div	12 Nov 82	3 Jan 83
Electro-Optical and Data Systems Group-Manufacturing Div	16 Nov 82	3 Jan 83

(Exhibit G of Brunmier's Declaration)

These disclosure statement amendments contained many disclosed changes, of which, the major change was the establishment of a group-wide material overhead pool. Based on the facts contained in the above amendments, I have determined that these disclosure statement amendments are adequate and in compliance with Cost Accounting Standards. This determination does not prevent its revocation, withdrawal or reconsideration if subsequent facts indicate that some aspects of the above amendments are not in compliance. It is my opinion the disclosed accounting changes do not result in any net increased cost to Government CAS covered contracts; therefore, no contract adjustments are required.

/s/ Allan E Brunmier
ALLAN E BRUNMIER
Principal Administrative
Contracting Officer

Cy to: DCAA/El Segundo
HAC/Mr P L Hendricks, Jr.
HAC/Mr T L Dougherty
HAC/Mr A N Kennedy
HAC/Mr D M Gledhill

(Exhibit H of Brunmier's Declaration)

Exhibit H

DEPARTMENT OF THE AIR FORCE

DET 36, AF CONTRACT MGT DIV. AF PLANT
REPRESENTATIVE OFC (AFSC)
HUGHES AIRCRAFT COMPANY, P.O. BOX 92463
LOS ANGELES, CA 90009

[SEAL]

REPLY TO ATTN OF
TMO/Sabala/(213)414-6454

RECEIVED
MAY 15, 1994
GOVERNMENT
ACCOUNTING

10 May 1984

SUBJECT
Disclosure Statement Amendment-Electro-Optical & Data Systems Group Engineering Divisions

TO
Hughes Aircraft Company
Attn: Mr. J. Stanley Crum
Vice President and Controller
El Segundo, CA 90245

Pursuant to FAR Part 30, I have reviewed the Disclosure Statement for the Electro-Optical & Data Systems Group Engineering Divisions as amended 31 October 1983. This amendment reflects the reclassification of assistant and associate laboratory and department managers from indirect to direct employees. Based on the facts contained in

the above amendment, I have determined that this disclosure statement is adequate and in compliance with Cost Accounting Standards. This determination does not prevent its revocation, withdrawal or reconsideration if subsequent facts indicate that some aspects of the amendment are not in compliance. In my opinion the disclosed changes in the above amendment will have no significant cost impact on Government CAS covered contracts; therefor I am not requesting a detailed total cost impact statement. No further action regarding the disclosed changes is required.

/s/ Allan E Brunmier
ALLAN E. BRUNMIER
Principal Administrative
Contracting Officer

Cy to: DCAA/El Segundo
HAC/Mr. P.L. Hendricks, Jr.
HAC/Mr. T.L. Dougherty

APPENDIX 8

JAMES J. GALLAGHER
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Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF ROBERT MEYERS SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED CONCURRENTLY HEREWITH HUGHES AIRCRAFT COMPANY, DATE: January 24, 1993 TIME: 9:30 a.m. CTRM: Hon. Judge David V. Kenyon

I, Robert Meyers, declare as follows:

1. I am an employee of Hughes Aircraft Company ("Hughes"), and am currently employed at Hughes' corporate offices. I have personal knowledge of the facts set forth in this Declaration and if necessary could testify competently thereto under oath.

2. I was assigned to Hughes' Electro-Optical and Data Systems Group ("EDSG") in 1979 and, from 1979 to 1986, I was the Division Controller for two different divisions within EDSG. In this capacity, I was responsible for managing the finance departments of these divisions.

3. In 1986, I was promoted to Assistant Group Controller of EDSG and, in 1989, to EDSG Group Controller.

4. Throughout the late 1970's, most of the EDSG lab managers who were responsible for supervising employees who worked on a variety of contracts (*i.e.*, those who ultimately ended up on the "direct allocation pool" system), were classified "indirect" and charged their time to indirect accounts. The primary tasks performed by these supervisors included troubleshooting, insuring adequate staffing for supervised contracts, and assisting subordinates to resolve technical problems. These supervisors also performed some ancillary administrative and personnel duties.

5. The time charged by these "indirect superiors" to indirect accounts was allocated across all the contracts on which EDSG employees worked. As a result, this time was allocated to a much broader group of contracts than was supported by their efforts.

6. It was felt that there was a better causal beneficial relationship for distribution of the labor time of supervisors. Thus, in the late 1970s, EDSG management (of which I was a part) began searching for a way to distribute the labor hours of lab managers more equitably over the actual contracts benefited, such that such labor hours were spread across all of the supervised contracts.

7. In connection with this search, EDSG management considered requiring managers to charge their time directly to the particular contracts they supported through their supervisory efforts each given day, according to the number of hours spent working directly on those contracts. During this timeframe, however, these managers were supervising the labor efforts of several and potentially hundreds of employees, who were working on potentially several hundred contracts or charge numbers. A system of direct charging, therefore, would have required managers to assess on a daily basis which of several hundred account numbers was associated with each direct task, as well as whether their tasks were "direct" or indirect". Such system would have required a significant daily data-gathering exercise and manual allocation of time to the appropriate charge numbers. This method could also require a supervisor to fill out tens of timecards weekly. Management believed this system would be administratively unfeasible and costly. In addition, the accuracy of the timecharge allocations by the individual supervisors would be difficult to audit, would put an undue burden on a supervisor to maintain the manual system and would lack controls to prevent manipulation.

8. Because of the problems inherent in this proposed system, EDSG management turned to a concept of "direct labor pools" set up earlier at other Hughes' organizations. Pursuant to this direct pool system, the time of supervisory employees whose labor benefited a definable group of contracts designated by the employees supervised by such supervisors was charged to a single account number and then "allocated" across the contracts on which their subordinates worked. In that way, the labor hours of these supervisory employees was allocated only to those contracts benefited by the managers' administrative/supervisory efforts, rather than to all contracts on which EDSG worked.

9. Following an analysis of the direct allocation pool systems already implemented elsewhere within Hughes, EDSG devised a system of direct allocation pools based on a fusion of these systems. Like the systems in place elsewhere within Hughes, the direct allocation system proposed for use at EDSG was designed to fairly apportion the labor time of lab managers and their secretaries across the totality of the contracts to which employees supervised by the lab managers charged their time. After this system was disclosed to and approved by the government, it was employed throughout EDSG, including in the Systems Engineering Lab.

10. No employee within any EDSG division could charge his or her time to the allocation system unless he or she had been formally authorized by the division controller to do so, because the timecharges of any non-authorized employee who attempted to charge his time to the allocation system would have been rejected by Hughes' computerized timekeeping system. Moreover, no

employee who was on the allocation system could charge to any account number other than that used for the allocation system pool, except to charge holiday, vacation or sick-leave time.

11. Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system and the supervised employees over which the supervisor's time would be allocated. This determination was made based upon a review of each employee's job classification, function and assignments. Pursuant to EDSG practices, authorized lab managers and their secretaries were eligible to be on the EDSG allocation system.

12. The allocation system was implemented as follows:

- Employees were required to submit a timecard each week, which identified each of the contracts on which they worked by account number and by the time spent working on each contract.
- Hughes' centralized timekeeping organization was responsible for entering the timecharge and account number data from all the employees' timecards into a centralized computer.
- The total hours worked by each employee authorized to charge his or her time through the allocation system also were input into the centralized computer via weekly timecards submitted by those employees. These hours then were allocated by the computer over the contracts to which the supervised employees had charged their time, in proportion to the

amount of time charged to each contract by the supervised employees.

Thus, for example: If Supervised Employee A charged 40 hours in a week to Contract X, Supervised Employee B charged 40 hours in the same week to Contract Y, and Supervised Employee C charged 40 hours for that week to Contract Z, and their supervisor charged 40 hours in the same week to the allocation system, then the computer system would automatically spread the supervisor's time in equal proportions (*i.e.*, 13.33 hours each) to each of Contracts X, Y and Z.

Because the supervisors on the allocation system supervised not merely three, but as many as several hundred employees, the labor hours of the supervisors were spread across the potentially hundreds of contracts to which their subordinates charged their time, in the appropriate percentages.

13. The determination of the appropriate percentage by which the allocation system employees' time would be spread to the contracts was not made by an individual, but was made automatically by the computer program utilized by Hughes' central timekeeping organization, and was based upon the actual hours and contracts charged by the supervised employees.

14. On a regular basis, Hughes' central timekeeping organization generated computer print-outs (known as "name runs") which they distributed to the program managers in charge of the performance of individual contracts. These name runs indicated the amounts of time each employee had charged time the contracts during a given period. The name runs also identified which

employees were on the allocation system, and how much of thei time was being allocated to the contract through the allocation system. The program managers generally disclosed the name runs on a periodic basis to the customers, including the government. This provided the customers with knowledge as to which employees were charging to the contract both directly, as well as through the allocation system.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 17 day of December, 1993, at Los Angeles, California.

/s/ Robert Meyers
ROBERT MEYERS

APPENDIX 9
(i)

JAMES J. GALLAGHER
FRED D. HEATHER
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Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF DUDLEY P. SLATER SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED CONCURRENTLY HEREWITH DATE: January 24, 1993 TIME: 9:30 a.m. CTRM: Hon. David V. Kenyon

I, Dudley P. Slater, declare as follows:

1. I am a retired government employee, having served from 1966 to 1988 with the Defense Contract Audit Agency ("DCAA"), the government agency with primary responsibility for conducting audits of bid proposals and requests for payments submitted by government defense contractors. I have personal knowledge of the following, and if necessary could testify competently thereto.

2. From August 1983 until 1988, I was assigned to the DCAA office at Hughes Aircraft Company, El Segundo ("Hughes") as the Resident Auditor, with cognizance over all audit functions. From 1983 to 1985, I had responsibility over the following Hughes' business organizations/segments: Electro-Optical and Data Systems Group ("EDSG"), Radar Systems Group ("RSG"), unclassified Space & Communications Group, and Corporate. Concurrently with my job functions as Resident Auditor, I was the Contract Audit Coordinator, with responsibility for all audit functions involving more than one segment of Hughes. In about the spring of 1985, the DCAA/El Segundo office was reorganized and another auditor took over the responsibility for EDSG and for the Unclassified Space & Communications Group. From that juncture until my retirement in 1988, I retained cognizance over Hughes RSG and Corporate.

3. Pursuant to the Cost Accounting Standards ("CAS"), prior to the first time a contractor submits a bid to work on a government contract, the contractor must submit to the DCAA and the Air Force Plant Representative Office ("AFPRO") a Cost Accounting Standards Disclosure Statement ("Disclosure Statement"), which details

the accounting practices utilized by the contractor. Disclosure to the government of the contractor's accounting practices made in the CAS Disclosure Statement is made at the level of the "business unit" that contracts to perform the effort requested by the government; a more specific disclosure with respect to each and every sub-organization under that "business unit" is not required, so long as the accounting practices of such sub-organizations are adequately described in the CAS Disclosure Statements.

4. After initial submission of a Disclosure Statement each time the contractor changes an accounting practice, it is required to submit to the DCAA and AFPRO an amended Disclosure Statement at least 60 days before the effective date of the proposed change. Thereafter, DCAA and AFPRO study the change, and either approve or reject it. Once the amended CAS Disclosure Statement is timely submitted to the government, the proposed change may be effected even before the contractor receives official approval for the change.

5. Among my responsibilities as DCAA Resident Auditor was to audit and review CAS Disclosure Statements submitted by the Hughes organizations over which I had cognizance, including EDSG. In reviewing those CAS Disclosure Statements, my office analyzed whether the practices described in the Disclosure Statements adequately described Hughes' actual accounting practices, and whether they were compliant with the Cost Accounting Standards. In conducting this review, my office evaluated the actual accounting practices in use by the business units within EDSG to determine whether such

accounting practices were adequately disclosed in Hughes' CAS Disclosure Statements.

6. In connection with my review of the Hughes' EDSG's CAS Disclosure Statements, I recall several discussions with the then-Assistant Group Controller of the EDSG, Al Kennedy, about the implementation of direct allocation pools throughout EDSG. During these discussions with Mr. Kennedy and other Hughes' personnel about this allocation system, the applicability of such a system to several "labs" organized within EDSG, whose employees worked on numerous contracts, at any given time, was discussed specifically. The allocation system at issue during these discussions involved the charging of time of lab managers and their secretaries into a direct pool, and then allocating this time over the cost objectives/contracts to which the lab employees being supervised by those lab managers charged their direct labor time.

7. In connection with my own analysis of the EDSG allocation system, I knew generally the functions of the EDSG lab managers and secretaries who were proposed to be placed on the allocation system. Based upon my knowledge of how the organizations within EDSG functioned, I understood that, while the bulk of the labor efforts of the lab managers and their support personnel specifically benefited identifiable contracts, (*i.e.*, direct labor functions), a small portion of the labor efforts of those individuals was devoted to generic administrative and supervisory tasks not specifically related to any contract. In my discussions with Hughes' personnel about the EDSG allocation system, I also was aware of the fact that because there is a grey area in distinguishing among

functions that are clearly identifiable as "direct" labor, and those clearly identifiable as "indirect" (based on the fact that the FAR definitions of direct costs – which include labor costs – and indirect costs – which include labor costs – are so broad), the lab managers and their staffs and secretaries, prior to the implementation of the allocation system, were having to make individual judgment calls as to whether each particular function they performed should be charged as a direct cost to a specific contract (or contracts), or as an indirect cost to an indirect account (which would then spread that employee's time over *all* the contracts being performed at that time by Hughes).

Because individual judgments were being made by different individuals, the distribution of those employees' timecharges was not necessarily consistent.

8. As I understood it, the rationale behind the implementation of the allocation system for EDSG was to eliminate the problems inherent in the system of relying on the individual lab managers and their support staffs to make their own judgment calls about how their time should be charged and, instead, to have *all* of the labor time of those employees charged to an allocation pool. In that manner, all of the timecharges of the manager/secretaries on the allocation system would be consistently spread to the cost objectives/contracts that were in the base of charges made by the employees being supervised by that lab manager, which is precisely what is required by the Cost Accounting Standards.

9. In connection with the discussions with Hughes about the EDSG allocation system, I reviewed specific

written finance practices prepared by Hughes which detailed the implementation of that system, which was a group-wide system that did not differentiate between the various sub-organizations and "labs" which utilized that system.

10. Also in connection with my review of EDSG's allocation system, my office analyzed the impact of having various levels of lab managers, assistant lab managers and their secretaries across EDSG charge their time into a pool which then spread the time charges of those employees to direct accounts based on the timecharges made to such accounts by the employees who were supervised by the lab managers and who were working on specific contract assignments associated with those account numbers.

11. After analyzing the allocation system that was disclosed in Hughes' EDSG CAS Disclosure Statements, my office determined that the allocation system increased the consistency and accuracy of timecharging of the lab managers and their staffs and, based upon that determination, our office (as well as the AFPRO) concluded that the allocation system by disclosed in EDSG's, CAS Disclosure Statements complied with the Cost Accounting Standards.

12. Based on these findings, I made a formal recommendation to Allen Brunmier, the Principal Administrative Contracting Officer, that the direct allocation pool system be approved.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 16 of December, 1993, at Los Angeles, California.

/s/ Dudley P. Slater
DUDLEY P. SLATER

Supreme Court, U.S.
FILED
APR 4 1997
CLERK

(2)

No. 96-1399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA EX REL. DON H. HAYCOCK,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

DANIEL R. ALLEMEIER
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Counsel for Respondent,
HUGHES AIRCRAFT COMPANY

49 pp

QUESTIONS PRESENTED

Hughes Aircraft Company takes issue with the convoluted and confusing statement of the questions presented in the petition. Instead, Hughes believes the questions at issue can be stated simply as follows:

1. Did both the District Court and Ninth Circuit (which reviewed the record de novo) err in concluding that Hughes did not submit any false claims to the government?

2. Did the courts below deny Petitioner due process by awarding Respondent attorneys' fees and expenses under 31 U.S.C. § 3730(d)(4), which provides for an award of attorneys' fees and expenses if a *qui tam* action is found to be "clearly frivolous"?

PARTIES TO THE PROCEEDING

As identified in the petition, the parties to the proceeding are pro se petitioner Don H. Haycock, Esquire (hereafter referred to as "Mr. Haycock") and respondent Hughes Aircraft Company ("Hughes").

For purposes of further clarification, Hughes notes that this action was brought under the so-called *"qui tam"* provisions of the civil False Claims Act (31 U.S.C. §§ 3729-3733 (1994)), which enable a private citizen (often referred to as a "relator") to bring a false claims action on behalf of the federal government, and under the Truth In Negotiations Act (10 U.S.C. § 2306 (1994)), which is a statute governing a contractor's disclosure of information to the government during contract price negotiations. The United States, which is identified in the case caption, has a right of intervention in all *qui tam* actions. In this action, Mr. Haycock prosecuted the action on his own after the United States declined to intervene. (R.8.) Pursuant to the government's request -- and as reflected on the proof of service -- the parties serve copies of all filed papers upon the government, even though the government is not a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Hughes notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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No. 96-1399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA EX REL. DON H. HAYCOCK,

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v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

INTRODUCTION

Hughes Aircraft Company respectfully requests that the Court deny the petition because Petitioner has failed to identify any compelling reason to grant *certiorari*.1/

1/ Hughes also notes that, as of the date of this Opposition, Mr. Haycock has failed to comply with this Court's Rule 12.3, requiring the petitioner to provide notice "promptly" to respondents of the date of filing, the date the case was placed on the docket, and the docket number of the case. S.Ct. Rule 12.3.

The petition identifies no conflicts between the Circuits (and there is none). The petition identifies no "important question of federal law" which should be decided by this Court or which was decided by the Ninth Circuit in contravention of any relevant decision of this Court. Moreover, Mr. Haycock provides neither facts nor authority to warrant this Court's exercise of its supervisory power to correct alleged injustices below.

Instead, Petitioner continues to prosecute this frivolous case as he did below. Unfettered by any sense of public duty and guided only by his personal animus toward Hughes, he misstates the facts, presents no authority to support his views, and improperly asks this Court to grant *certiorari* to reverse the decisions below on the grounds of alleged erroneous findings of fact and misapplication of the law. Moreover, notably missing from the petition is a copy of the District Court's Order Granting Summary Judgment, setting forth its findings of fact and conclusions of law, and several key portions of the District Court's order regarding the parties' motions for summary judgment (select excerpts of which are attached to Petitioner's Appendix 3). Thus, Petitioner omits from the record the most critical portions of the orders his petition questions.

OPINIONS BELOW

At issue in the petition is the unpublished opinion of the Court of Appeals, filed October 6, 1996 (and reprinted in the Petitioner's Appendix to the Petition ("Pet. App.") at App. 2-4), and the unpublished order of the Court of Appeals denying Petitioner's petition for rehearing and rejecting his suggestion for rehearing *en banc*, filed December 6, 1996 (and reprinted at Pet. App. at App. 1).

The District Court's unpublished opinion granting Hughes' motion for summary judgment and denying Mr. Haycock's motion for summary judgment on the merits (only part of which Petitioner appended to his petition) is reprinted in full in the Appendix to this Brief in Opposition to Petition for Writ of *Certiorari* ("Resp. App."), at 1a-4a. The District Court's unpublished Order Granting Summary Judgment, setting forth the court's findings of fact and conclusions of law, is reprinted in Resp. App., at 5a-24a.

The District Court's unpublished order granting Hughes' motion for award of attorneys' fees pursuant to 31 U.S.C. § 3730(d)(4) is reprinted at Pet. App. at App. 8-13. The District Court's unpublished order denying Mr. Haycock's motion for reconsideration of the attorneys' fees award is reprinted at Pet. App. at App. 14-15.

PERTINENT STATUTORY PROVISIONS

(Not already noted in the petition)

The Civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.* provides, in part:

> § 3730(b) Actions by private persons. -- (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
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> (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
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> (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the

defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

STATEMENT OF THE CASE

Mr. Haycock brought this *qui tam* action under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA")[2/] and the Truth In Negotiations Act, 10 U.S.C. § 2306 ("TINA"). After an extensive 20-month investigation pursuant to 31 U.S.C. § 3730(b), the United States declined to intervene in the case. (R.8.) Once unsealed, Mr. Haycock's complaint of fraud proved fundamentally flawed. First, as the courts below found, based on the evidence provided by Hughes, Mr. Haycock misunderstood the way Hughes employees charged labor time to government contracts via an allocation pool. (Pet. App. at App. 5-7; 9; Resp. App., at 1a-4a, 8a, 14a-16a.) Then, because he erroneously believed that the relevant Hughes employees were classified as "indirect," Mr. Haycock compounded his error by asserting that those employees should have been charging their labor time to "indirect" or "overhead" accounts, rather than directly to

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2/ The history, background and legislative purpose behind the *qui tam* provisions of the False Claims Act are summarized in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991).

government contracts. (*See* Resp. App., at 8a.) Having made a mistake, frequently made by those not schooled in the technicalities of government contract cost accounting, Mr. Haycock alleged that Hughes' actions violated the cost accounting standard disclosure statement ("CAS Disclosure Statement") that Hughes had submitted to the government, as well as the federal cost accounting regulations. *Id.*

During discovery, Mr. Haycock conceded that he neither read Hughes' CAS Disclosure Statement before filing his complaint nor knew that it specifically provided for a direct allocation pool into which the relevant Hughes' employees could charge their time.[3/] (*See* Resp. App., at 14a-16a; Pet. App. at App. 9.) Discovery also disclosed that Mr. Haycock was ignorant of how the relevant Hughes' employees actually charged their time; he incorrectly believed that each employee listed hundreds of different contract numbers on a time card each week and then arbitrarily spread labor time over those contract numbers, regardless of whether they actually worked on the contracts associated with those numbers.

Mr. Haycock also was unaware that the government had reviewed Hughes' disclosure of its direct charge allocation system before it was instituted, as well as the mechanics of the system itself, and that the government had found the system and Hughes' disclosure to be compliant with federal government contract accounting regulations. *Id.* When Mr. Haycock learned of the direct allocation pool and of Hughes' government-approved disclosure statement, he

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3/ Specifically, Hughes' relevant CAS disclosure statements provided in pertinent part as follows:

> a direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

Hughes' CAS Disclosure Statement, Section 2.5.0. (Pet. App. at App. 43.)

wrote Hughes, stating that if Hughes could "prove" this revelation (to him) about the disclosure statements, he would fold his case. (Pet. App. at App. 9-10.) Hughes subsequently provided Mr. Haycock the relevant CAS Disclosure Statements for 1983 - 1987, the years Mr. Haycock claimed were at issue. Hughes also provided copies of other relevant documentation that Hughes had submitted to the government in that timeframe in conjunction with its accounting system disclosures, and declarations from the two responsible government officials charged with responsibility for auditing, reviewing and approving Hughes' accounting system for the relevant years. (Resp. App., at 3a-4a.) Those two government officials' declarations stated that they had reviewed and approved of Hughes' CAS disclosure statements and its direct allocation pool charging system for the employees in question. (*Id.*, 10a-14a.)

Notwithstanding the receipt of those declarations and his promise to fold, Mr. Haycock continued to prosecute the case. At the same time that Hughes filed a motion for summary judgment, Mr. Haycock filed his own summary judgment motion. (R. 58-62.) He filed no "expert" declaration in conjunction with either his own summary judgment motion or Hughes' summary judgment motion.[4/] Rather, as the trial court below found, he continued to rely solely on his own "misguided" interpretation of the government officials' declarations, the disclosure documentation submitted to the government by Hughes, and the federal regulations and Cost Accounting Standards. (Pet. App. at App. 5-6.)

4/ The "expert" declaration (of Peter Elliott) Mr. Haycock now relies on to support his claims in the petition was not in the record before the District Court at the time it considered the parties' cross-summary judgment motions. Rather, without seeking leave of court or putting forth any reason for his failure to submit that declaration with the parties' cross-motions for summary judgment, Mr. Haycock only belatedly filed his "expert's" declaration in conjunction with his motion for reconsideration of the attorneys' fees award (R. 139), after the District Court ruled on the summary judgment motions and after the ruling on Hughes' attorneys' fees motion.

Based solely on his fallacious views (and without any supporting evidence), Mr. Haycock argued in his summary judgment papers that Hughes' disclosure documentation and the government approval did not cover the majority of the Hughes' Systems Engineering Laboratory ("SEL") employees who were charging their time directly to government contracts. (R.58-62.) Rather, although he never specifically identified (either by name or by job category) which employees supposedly were not covered, he argued that the disclosure statement and government approval only extended narrowly to five categories of SEL employees. *Id.* Mr. Haycock claimed that Hughes' system of charging such SEL employees' time directly to contracts, therefore, violated Hughes' "promise to the Government" to follow its disclosed cost accounting standards practices (Resp. App., at 21a ¶ 23), and constituted the submission by Hughes to the government of false or fraudulent claims for payment in violation of the FCA, and of maintaining inaccurate historical cost records in violation of TINA. *Id.*[5/]

As found by the District Court, the evidence submitted by Hughes in support of its motion for summary judgment contradicted Mr. Haycock's claims. (Pet. App. at App. 6-7, 10-12. The court found that Hughes conclusively demonstrated that its practice of directly charging the labor time of the SEL employees addressed in Mr. Haycock's complaint was compliant with the Cost Accounting Standards. *Id.* The court also found that Hughes' evidence showed that its CAS Disclosure Statement properly disclosed its charging practice to the responsible government officials. *Id.* The court also found that Hughes demonstrated that

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5/ TINA requires that defense contractors engaged in negotiations with the government for certain defense contracts (defined in the statute) submit, at the conclusion of negotiations and prior to award of the contract, an executed certificate that states that all cost or pricing data submitted by the contractor to support negotiations was "current, accurate and complete." 10 U.S.C. § 2306(f). Mr. Haycock never explained how (or presented any evidence to show why) Hughes' cost charging practice for the SEL employees at issue supposedly constituted a violation of TINA. (Pet. App. 2 at App. 3; *see also* Resp. App., at 19a-21a.)

those government officials had approved that time charging practice. *Id.*

In addition to making these findings, the District Court also undertook a thorough independent review of the evidence submitted by Mr. Haycock, but was unable to find any credible evidence in the record supporting Mr. Haycock's allegations. (Pet. App. at App. 5-6.)

In granting Hughes' motion for summary judgment and denying Mr. Haycock's motion for summary judgment, the District Court expressly found that Mr. Haycock's claims were unsupported, and that the language set forth in Hughes' disclosure statements was not limited in the way Mr. Haycock suggested. (Pet. App. at App. 7.) In its March 4, 1994 order (Resp. App., at 1a-4a), the District Court stated, in pertinent part:

> The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence. . . . The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

Id., at 2a. The court also found that Mr. Haycock had offered no evidence to contradict or question the testimony of the government officials whose sworn declarations supported Hughes' position. *Id.*, at 3a-4a. The court concluded that, "The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system." *Id.*, at 4a. In its separate order setting forth its findings of fact, the court adopted verbatim (with the exception of a proposed conclusion regarding Rule 11

sanctions sought by Hughes) Hughes' proposed findings of fact and conclusions of law. (*See* Resp. App., at 2a, 5a-24a.)

Following the March 1994 summary judgment order, in April 1994, Hughes submitted a motion for an award of attorneys' fees and costs incurred by Hughes under section 3730(d)(4) of the FCA. That section provides for an award of attorneys' fees and expenses if a *qui tam* action is found to be "clearly frivolous." Giving Mr. Haycock the benefit of the doubt as to his underlying (and mistaken) assumptions in support of his claims for the period from the commencement of his suit until he received from Hughes the relevant CAS Disclosure Statements and declarations of the government officials responsible for approving Hughes' cost accounting practices, Hughes limited its attorneys' fees and cost request to the costs and fees it incurred after December 20, 1993 (the date when Mr. Haycock received from Hughes the government officials' declarations). (R. 117.) The District Court granted Hughes' attorneys' fees request, based on its determination that Mr. Haycock continued to prosecute his case long after all the allegations in his complaint had been addressed by Hughes and shown to be without merit. For the period after Hughes' service of the government officials' declarations, the court found that Mr. Haycock's continuation of the litigation was "clearly frivolous." (Pet. App. at App. 8-13.)

After the District Court denied his motion for reconsideration of the summary judgment order and attorneys' fees award (Pet. App. at App. 14-15), Mr. Haycock appealed to the Ninth Circuit. (R. 192.) On appeal, Mr. Haycock relied primarily on the declaration of his "expert," which had not been before the District Court during its consideration of the summary judgment motions (but which he submitted for the first time only in conjunction with his motion for reconsideration of the Court's attorneys' fees award). *See supra*, note 4. Mr. Haycock alleged that the District Court applied the incorrect rule of law to the relevant facts and incorrectly concluded that Hughes' time charging practice was fully disclosed and approved by the responsible government representatives. Notwithstanding, during oral argument before the Ninth Circuit, Mr. Haycock conceded that there was no evidence in the record (other than his "expert's declaration which was not in the record below) to

contradict the government officials' declarations. (*See* Petition, at p. 24.) The Ninth Circuit reviewed Mr. Haycock's "expert" declaration and determined that "the [trial] court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped litigating after the disclosures which showed absence of fraud or false statement." (Pet. App. at App. 4.)

After reviewing the record de novo, and following oral argument, the Ninth Circuit rejected Mr. Haycock's allegations, concluding in an unpublished opinion that Mr. Haycock presented no evidence of fraud or false statement, nor was there evidence in the record to show that Hughes had provided false pricing information to the government or otherwise falsely certified its costs under TINA. (Pet. App. at App. 2-4.) Finally, the Ninth Circuit reviewed the award of attorneys' fees for abuse of discretion, and determined that the District Court was within its discretion to award attorneys' fees under the FCA. *Id.* Following issuance in October 1996 of the Ninth Circuit's unpublished decision, Mr. Haycock petitioned the Ninth Circuit for rehearing and for publication of its ultimate decision in the case. The Ninth Circuit denied Mr. Haycock's requests. (Pet. App. at App. 1.) Thereafter, even though he had failed to prevail at each stage of the proceedings, Mr. Haycock filed an application for an award of costs pursuant to the Ninth Circuit's rule providing for such an award to the prevailing party on appeal. The court did not rule on Mr. Haycock's cost application, but in December 1996 granted Hughes' earlier-filed cost application.

In contrast to Mr. Haycock's misstatements of the facts and law in his petition, the opinions of the District Court and the Ninth Circuit correctly set forth the facts of this case and the proceedings below. The FCA requires a false claim in the first instance, and the courts found no evidence of a false claim. (Pet. App. at App. 2-15; Resp. App., at 1a-4a, 18a ¶ 24.) The FCA also permits an award of attorneys' fees and costs to be made to the defendant, where the court finds that a *qui tam* action was "clearly frivolous." 31 U.S.C. § 3730(d)(4). Applying the law to the facts in this case, the courts below ruled correctly in determining that there were

no unauthorized labor charges that were charged directly to government contracts and, therefore, no FCA or TINA violation. Based on Mr. Haycock's receipt during discovery of conclusive evidence underlying the courts' rulings, it was properly within the courts' discretion to conclude that Mr. Haycock's continued prosecution of his action was "clearly frivolous," warranting an award of attorneys' fees and costs under the FCA.

Mr. Haycock's attempt to assign error to the lower courts is wholly inadequate to establish a compelling basis for this Court to grant *certiorari*. The lower courts' informed decisions declining to accept his baseless interpretations of government actions in reviewing and approving Hughes' labor charging system do not provide Mr. Haycock the compelling basis he needs to obtain this Court's review.

REASONS FOR DENYING THE PETITION

Pursuant to Rule 10 of this Court, review by this Court on a writ of *certiorari* is not a matter of right. S.Ct. Rule 10. Instead, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502 (1951), *citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)*. *Certiorari* is granted only for compelling reasons, such as where there is a conflict between decisions of different Circuit Courts, or where a lower court has decided an important question of federal law that has not been, but should be, settled by the Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. S.Ct. Rule 10. Another ground is where conduct in the courts below has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court must intervene in exercise of its supervisory power. *Id.*

Here, none of those grounds exists. As discussed more thoroughly *infra*, the unpublished opinions of the trial court and Ninth Circuit in this matter have no precedential value, and the determinations and fact-intensive conclusions of

those courts pertain solely to Mr. Haycock and Hughes. The Ninth Circuit's decision creates no conflict among the Circuits. There also are no important federal questions at issue. Further, despite the claim of a Constitutional violation, there is no public interest at stake, nor any factual or legal support that any such violation occurred. Also, the well-founded and well-reasoned concurring conclusions of both courts below in no way evidence any departure from the accepted and usual course of proceedings so as to call for an exercise of this Court's supervisory power.

Instead, rather than set forth any compelling basis to grant *certiorari*, Mr. Haycock's petition is based solely upon his hostility toward Hughes. Unlike a public prosecutor who is bound by a code of professional conduct and by a sense of public duty, Mr. Haycock is the all too common private relator who freely offers erroneous allegations of fact and misapplications of law. Mr. Haycock has presented no substantial question for review. It is well-settled that such grounds do not suffice (except only rarely) to compel the Court to grant *certiorari*. S.Ct. Rule 10. As such, Hughes submits that the petition should be denied.

A. PETITIONER ASSERTS ONLY ERROR BASED UPON ERRONEOUS FACTUAL FINDINGS AND MISAPPLICATION OF LAW WHICH ARE NOT SUFFICIENT TO WARRANT SUPREME COURT REVIEW.

Mr. Haycock asserts error in the factual determinations and legal conclusions concurred in by the two lower courts. To support his claims, he presents his issues using inflammatory language, misstates the facts in the record, and cites to an alleged Constitutional violation of his due process rights in an attempt to mislead the Court into believing that something truly important is at stake here.

The purpose of granting *certiorari* is not for this Court to correct an error in a lower court's decision. This Court does not grant *certiorari* merely to review findings of fact concurred in by two lower courts, or to review evidence or inferences drawn from evidence. *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938); *United States v. Chemical Foundation*, 272 U.S. 1, 14 (1926). Decisions of lower courts which are

dependent upon the facts are not to be disturbed, unless plainly without support. *Id.*

Here, as demonstrated in the lower courts' decisions, there is ample evidence to support those decisions. Conversely, there is no credible evidence in the record to support Mr. Haycock's allegations, as determined by both courts below. As discussed above in the Statement of Facts, the District Court found that Mr. Haycock had provided it with "little if any guidance as to where to look for support for [Mr. Haycock's] assertions," so the court "independently reviewed the mass of documentation submitted," but could find no support for Mr. Haycock's claims. (Pet. App. at App. 5-6.) The Ninth Circuit, after reviewing the record *de novo*, opined: "we conclude that Haycock presented no evidence of fraud or false statement." (Pet. App. at App. 3.) Also, Mr. Haycock's dire prediction of the horrible consequences that will result by allowing the Ninth Circuit's decision to stand is mere hyperbole. (Petition, at pp. 28-29.) The Ninth Circuit determined that its decision on this matter was not appropriate for publication. (*See* Pet. App. at App. 2).[6/] Pursuant to the Ninth Circuit's Rules:

> Any disposition that is not an opinion or an order designated for publication. . . **shall not be regarded as precedent** and shall not be cited to or by this Court or any district court of the Ninth Circuit. . . .

USCS Court Rules, Court of Appeals, Ninth Circuit, Rule 36-3 (emphasis added). Therefore, the Ninth Circuit's decision in this case has no precedential value and, as such, can have no bearing (positive or negative) on the future behavior of Government contractors.

6/ The Ninth Circuit designated for publication only a separate opinion issued in this case, relating solely to the issue raised on appeal by Hughes (and not addressed or cited in the petition) of the timing of the filing of a notice of appeal in a *qui tam* case. In petitioning for rehearing to the Ninth Circuit, Mr. Haycock requested publication of the court's ultimate decision on the merits, but the court denied his requests (both for publication and for rehearing). (Pet. App. at App. 1.)

To grant *certiorari* in this case would entail a lengthy factual review by this Court of the evidence to determine whether the two lower courts' concurring determinations were clearly without support. Such is not the purpose of review by this Court. S.Ct. Rule 10; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). Therefore, the Court should deny the petition.

B. THERE IS NO CIRCUIT CONFLICT IN ISSUE.

Mr. Haycock argues that this Court should grant *certiorari* to correct the Ninth Circuit's misinterpretation and misapplication of federal regulations which, if allowed to stand, will provide:

> an invitation to present and potential Government contractors to engage in this unlawful labor-charging practice because the Ninth Circuit has approved it.

Petition, at p. 28. He cites Sixth Circuit and Second Circuit cases for the proposition that "knowingly charging unauthorized overhead labor to the United States government as labor directly on government contracts has been held a fraud under the False Claims Act." *Id.*, at p. 9. However, he does not claim that the Ninth Circuit's decision in this case contradicts those circuits' holdings, nor does it. To the contrary, the Ninth Circuit did not say that there was no fraud when one knowingly charges unauthorized overhead labor as direct labor. Rather, the Ninth Circuit merely said that there was no evidence of any unauthorized overhead labor being charged directly to a government contract. (Pet. App. at App. 2-4.) Thus, in accordance with the law as enunciated by the Sixth and Second Circuits, and not contrary to it, the Ninth Circuit correctly concluded that the record established no fraud.

Review by this Court, therefore, is not warranted because there is no split in decisions between the Circuits. S.Ct. Rule 10; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

C. THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW AT ISSUE.

In addition, there is no important federal question at issue here; nor did the lower courts act outside the normal and acceptable bounds of justice in this case. As discussed above, this is not a case in which the Ninth Circuit misconstrued federal government contract regulations and concluded, as a matter of law, that a contractor may lawfully charge unauthorized indirect labor charges directly to a contract. Nor did the Ninth Circuit misconstrue or misapply the FCA or TINA to the facts in the record before it. Instead, the Ninth Circuit properly looked to the record for any evidence of unauthorized charging of indirect labor as direct labor and found no such evidence. (Pet. App. at App. 2-4.) Determining that the record was void of evidence that Hughes' labor charges were unauthorized or lacked the required approval by the government and, therefore, were not in compliance with the federal contract regulations, the Ninth Circuit concluded that neither Mr. Haycock nor the record established an FCA or TINA violation. *Id.* Mr. Haycock's disagreement with the government officials responsible for overseeing Hughes' cost charging practices and determining when to prosecute legitimate cases of fraud and with the lower court's findings of fact establishes no important federal question. S.Ct. Rule 10; *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938).

D. THE ALLEGED CONSTITUTIONAL VIOLATION CLAIM IS BASED ON MR. HAYCOCK'S DISPLEASURE WITH THE LOWER COURTS' FINDINGS AGAINST HIM; IT DOES NOT IMPACT THE PUBLIC INTEREST.

Mr. Haycock's Constitutional claim also is insufficient to warrant Supreme Court review. He claims that the trial court denied his request for a hearing and awarded Hughes attorneys' fees and costs based "on a mistaken understanding of what the evidence proved." (Petition, at pp. 29-30). In so arguing, he completely ignores the fact that the Ninth Circuit also conducted its own review of the issue and came to the same conclusion as the trial court. (*See* Pet. App. at App. 4.) Moreover, Mr. Haycock's due process complaint pertains

exclusively to him. There is no public interest at stake in the courts' conclusion that Mr. Haycock's continuing to prosecute the case was "clearly frivolous," after Hughes gave him uncontroverted evidence that Hughes' labor charging practices were disclosed to, investigated by and approved by the government. Nor is there any public interest at stake in the courts' determination that Mr. Haycock failed to rebut with credible evidence Hughes' evidence of approval and authorization.

This Court has long denied review where the resolution of the principles involved in the case are important only to the parties, rather than to the public. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Here, the only person affected by the trial court's award of attorneys' fees (which the Ninth Circuit affirmed after hearing oral argument on the subject) is Mr. Haycock himself. The FCA expressly provides for an award of attorneys' fees when an appropriate finding is made in a *qui tam* relator's lawsuit. 31 U.S.C. § 3730(d)(4); *and see United States ex rel. Minna Ree Winer Children's Class Trust v. Regions Bank*, 1996 U.S. Dist. LEXIS 8779, *1-2 (E.D. La. 1996) (relator's "fact-starved" allegations and worrisome litigious history amply support court's finding that defendants had demonstrated that relator's suit is clearly frivolous and that defendants are entitled to reasonable attorneys' fees and expenses in defending such claims under 31 U.S.C. § 3730(d)(4)); *United States ex rel. Herbert v. Nat'l Acad. of Sciences*, 1992 U.S. Dist. LEXIS 14063,*1 (D.D.C. 1992) ("because both the jurisdictional and substantive bases of Plaintiff's *qui tam* action so clearly failed to state a valid federal claim, this Court will grant the Defendant's motion for reasonable attorneys fees and expenses under 31 U.S.C. § 3730(d)(4) and Rule 11").

The public is not harmed by the courts' attorneys' fees award in accordance with that law; to the contrary, public interest is well-served by the fact that the courts did precisely what Congress intended they should do in such a case. Therefore, *certiorari* should not be granted on this basis.

CONCLUSION

For the foregoing reasons, Hughes urges the Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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April 4, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of America *ex rel.* Don H. Haycock, Plaintiff, v. Hughes Aircraft Company, Defendant.	CV 90-1977 KN ORDER Re: Motion to Dismiss and Motions for Summary Judgment (Filed Mar. 4, 1994)

Based on the papers submitted, the Court rules as follows:

1. The court does not decide Defendant's motion to dismiss portions of the Second Amended Complaint ("SAC") based on the statute of limitations because Plaintiff's underlying claims lack merit and therefore, as discussed below, granting Defendant's motion for summary judgment disposes of this case.[1/]

1/ Were the Court to decide this motion, the principal issue would be whether the SAC relates back to the original complaint under Fed.R.Civ.P. 15(c). The standard in the Ninth Circuit is: did "the original pleading put the defendant on notice of the 'particular transaction or set of facts' that the plaintiff believes to have caused the complained of injury." *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 979 (9th Cir. 1988). Because Plaintiff's original and first amended complaint were both dismissed for failure to plead with the requisite particularity under Fed.R.Civ.P. 9(b), Defendant would have a strong argument that these pleadings also did not give sufficient notice for purposes of Rule 15(c).

(Footnote cont'd on next page)

2. Plaintiff's motion for summary judgment is **DENIED**. The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence, and in form they fail to comply with the Federal and Local Civil Rules. The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

3. Defendant's motion for summary judgment is **GRANTED**. In addition to adopting the vast majority of Defendant's Statement of Uncontroverted Facts and Conclusions of Law, and signing Defendant's proposed Order granting summary judgment (with one paragraph excepted), the Court adds the following observations:

A. Although Plaintiff/Relator is representing himself, he is an attorney and a member of the bar. It is therefore difficult for the Court to understand how Mr. Haycock could fail to comply with the simplest of Local Rules -- *e.g.*, Plaintiff failed to file both points and authorities entitled "Opposition to Defendant's Motion for Summary Judgment" and a "Statement of Genuine Issues of Material Fact." *See* Local Rules 7.6 and 7.14.2. Instead, Plaintiff filed (1) a document entitled "Supplemental Points and Authorities in Support of Plaintiff's Motion for Summery

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(Footnote cont'd from previous page.)

As to the retroactivity argument, the Court has taken the position in other cases that to the extent the 1986 Amendments to the False Claims Act affected substantive rights -- as the extension of the statute of limitations surely did -- they may not be applied retroactively. *Hyatt v. Northrop*, CV 86-6437 KN, Order of October 1, 1993 at pp. 7-11.

Judgment," which is later (on the bottom of the cover page) characterized as being "in response to defendant's motion for summary judgment," and (2) a document entitled "Plaintiff's Response to Defendant's statement of uncontroverted facts and conclusions of law in support for summary judgment," which is utterly devoid of the specificity needed for the Court to determine if there is evidence to support Plaintiff's assertions of genuine issues of fact. *See* Local Rule 7.14.3. In addition, Plaintiff filed a "Supplemental Statement of Uncontroverted Facts," a document not authorized by the Local Rules and which Plaintiff did not seek leave of Court to file.

B. The crux of Plaintiff's dispute with Defendant's theory of the case appears to be that any disclosure by Hughes and/or approval by the government of using the allocation system of charging certain labor costs was limited to a small number of specific categories of technical managers and therefore did not include any other supervisory or manager-level employees or their secretaries. Such a reading of the record may be understandable if one looks only at certain documents (and for this reason the Court does not find it appropriate to impose sanctions against Plaintiff).[2/] Nevertheless, other than Plaintiff's unsupported assertions to the contrary, the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of managers, supervisors, secretaries, and other support personnel. Slater Decl. ¶¶ 6, 7,

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2/ For example, in a letter of August 24, 1983, Hughes' controller wrote to the government mentioning the reclassification of "assistant, associate and laboratory and department managers." Brunmier Decl. I at 65. Mr. Slater's Report of April 25, 1984, and Mr. Brunmier's memo of May 10, 1984, also both referred only to reclassification of specific categories of managers. *Id.* at 184, 188. And, no explicit mention of secretarial time was made until the December, 1986 Disclosure Statement. *Id.* at 173.

8, 10, & 11; Brunmier Decl., ¶ 13(c), (d); Defendant's Reply of January 19, 1994 at pp. 24-29. Plaintiff has offered no evidence to contradict or question the testimony of these declarants (nor, apparently, has Plaintiff deposed them). And, the most important document language -- that which is set forth in Hughes' Disclosure Statements -- is clearly not limited in the way Plaintiff suggests. *E.g.*, Brunmier Decl. at p. 71. The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system.

IT IS SO ORDERED.

Dated: March 4, 1994

/s/ DAVID V. KENYON
DAVID V. KENYON
UNITED STATES
DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) ORDER GRANTING SUMMARY JUDGMENT ~~[PROPOSED]~~ - (KN) (Entered March 8, 1994)

This action having come before the Court on Defendant HUGHES AIRCRAFT COMPANY'S Motion For Summary Judgment, the evidence presented having been fully considered, the Court finds as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. This action, filed in April 1990 by California-licensed attorney, Don H. Haycock, Esq. ("relator"), as *qui tam* relator pursuant to the False Claims Act ("FCA"), accuses Hughes Aircraft Company ("Hughes") of mischarging the labor time of managers and secretaries of the Systems Engineering Laboratory ("SEL") of Hughes' Electro-Optical and Data Systems Group ("EDSG"). Specifically, relator alleges that, between 1983 and 1987, managers and secretaries of the SEL improperly charged their time directly to contracts, instead of to "overhead" or "indirect" accounts, in violation of what relator alleges was Hughes' "promise to the government" set forth in Hughes' Cost Accounting Standards Disclosure Statement, the statement of its cost accounting practices required by federal regulation to be submitted to the government by federal defense contractors.

A. THE PARTIES

1. Defendant Hughes is a major supplier of military hardware to the United States government. The Hughes organization at issue in this case, the SEL, was a unit of the Division 71 of the EDSG, located in El Segundo, California. Division 71 was referred to at various times relevant to this action as the "Tactical Programs Division" and "Tactical Systems Division."

2. Throughout the period alleged in the Complaint, the SEL provided engineering support on an as-needed basis to a variety of governmental and commercial programs (including direct sales to foreign governments) performed by EDSG.

3. The SEL was comprised of several hundred engineers with a variety of areas of expertise. It was supervised by several levels of managers, who were responsible for evaluating the engineering needs of the supported programs, assigning SEL engineers with

appropriate skills to such programs, supervising the performance of these engineers, and evaluating the suitability of the engineering effort performed in light of the contractual requirements. (Deposition of Kai Thomassen ("Thomassen Depo."), pp. 11:25-13:3 (Exh. J to Myers Decl.; Deposition of Nate Simmons ("Simmons Depo."), pp. 12-14, 31-35 (Exh. K to Myers Decl.); Deposition of Jeffrey B. McConnell ("McConnell Depo."), pp. 41-42 (Exh. L to Myers Decl.).)

4. During the relevant time period, the SEL was part of a "matrix" organization, in which supervisory responsibilities were shared by managers in charge of the tasks that support contracts (program managers) and managers responsible for the resources (including the human resources and, as such, raises, promotions, etc.) that support contracts. (McConnell Depo., pp. 39:20-43:1 (Exh. L to Myers Decl.); Thomassen Depo., pp. 13:16-14:23 (Exh. J to Myers Decl.).)

5. Relator, Don H. Haycock, Esq., was an employee of Hughes Aircraft Company from 1961 to December, 1987. He joined the SEL in April 1984, where he worked in an engineering capacity until his retirement from Hughes in December, 1987. (Deposition of Don Haycock ("Haycock Depo."), Vol. I, pp. 12-42 (Exh. M to Myers Decl.).)

B. FILING OF THE INSTANT COMPLAINT

6. In April, 1990, relator filed this *qui tam* action under seal on behalf of the United States pursuant to the civil False Claims Act ("FCA"), 31 U.S.C. § 3729-3733.

7. After a lengthy investigation of relator's allegations and his evidentiary support submitted to the U.S. Department of Justice pursuant to 31 U.S.C. § 3730(b)(2)-(3), the government notified the Court in December, 1991, that it declined to intervene in this action.

8. On April 13, 1992, Hughes moved for an order dismissing relator's complaint for failure to plead fraud with particularity, which was granted by this Court on June 20, 1992.

9. On July 9, 1992, relator filed and served a First Amended Complaint, which was also dismissed by this Court for insufficient particularity.

10. On October 27, 1992, relator filed a Second Amended Complaint ("Complaint"), which is now the governing complaint in this action. Hughes answered the Complaint in November, 1992.

C. ALLEGATIONS OF THE COMPLAINT

11. The fundamental proposition of relator's Complaint is that SEL managers and secretaries, who performed what relator calls "indirect" or "overhead" functions, and who relator believes should have been directed to charge their time to "indirect accounts," were instead directed to charge their time to "direct labor" accounts, in violation of Hughes' promise to the government. (Complaint, ¶¶ 5-7.)

12. Relator's First Count alleges that this time-charging practice resulted in the submission of inflated claims for payment to the United States with respect to both "direct" and "indirect" costs, in violation of the FCA. (Complaint, ¶ 19.)

13. Relator's Third Count, which follows from his first, alleges that Hughes failed to maintain "accurate, current, and complete historical records" of actual direct labor costs, purportedly in violation of the Truth In Negotiations Act, 10 U.S.C. § 2306. (Complaint, ¶¶ 12, 27.)

14. A second Count, which was alleged in relator's original complaint, was dropped from the Second Amended Complaint.

D. HUGHES' UNDISPUTED EVIDENCE DEMONSTRATES THAT THE TIMECHARGING SYSTEM AT ISSUE WAS DISCLOSED TO AND APPROVED BY THE GOVERNMENT

15. Most of the SEL secretaries and managers named in relator's complaint charged their time directly to contracts through a "direct allocation system," which proportionately allocated their time, by way of a computer algorithm, to the totality of accounts charged by the employees who were supervised by the managers and for whom the secretaries

performed their efforts. This "direct allocation system" was implemented at Hughes only when it was fully disclosed to and approved by the government, and is consistent with similar systems used throughout Hughes and the defense industry in general.

16. Throughout the years immediately preceding the time period identified in the Complaint, most of the EDSG managers who were responsible for supervising employees who worked on a variety of contracts, (and who ultimately ended up on the allocation system,) were classified "indirect" and charged the preponderance of their time to indirect accounts. (Declaration of Robert Meyers ("R. Meyers Decl."), ¶ 4.) The primary tasks performed by these managers included trouble-shooting, insuring adequate staffing for each supervised contract, and assisting subordinates to resolve technical problems; managers also performed ancillary administrative and personnel duties. *Id.*

17. The time charged by those managers to indirect accounts was accumulated in what were referred to as "indirect cost pools" and then allocated across all the contracts on which EDSG worked; as a result, this time was allocated to a broader group of contracts than those which were most immediately supported by these managers. This led to an imprecise allocation of burden on unsupported contracts. *Id.* ¶ 5.

18. In the late 1970s, EDSG management began searching for a more equitable way to distribute the labor hours of lab managers responsible for supervising employees over the actual contracts benefited, such that those labor hours were fairly spread across only the supervised contracts. *Id.* ¶ 6.

19. In connection with this search, EDSG management considered requiring managers to charge their time directly to the particular contracts they supported through their supervisory efforts each given day, according to the number of hours spent working directly on those contracts. Because, however, these managers were supervising the labor efforts of as many as several hundred employees, who were working as many as several hundred contracts, a system of direct charging would have required managers to record on a daily basis each of the many account numbers associated with their

efforts, as well as whether their efforts were "direct" or indirect". Such a system would have required significant daily data-gathering and manual allocation of time to the appropriate charge numbers, and could easily have been manipulated (*i.e.*, by charging time away from overrun accounts). (R. Meyers Decl., ¶ 8.)

20. Because of the problems inherent in this proposed system, EDSG management turned to a concept of "direct labor pools" set up several years earlier at other Hughes' organizations. Pursuant to these direct pool systems, the time of lab managers and their secretaries whose labor benefited a definable group of contracts was charged to a single account number and then "allocated," by way of a computer algorithm, across the contracts on which their subordinates worked. In that way, the labor hours of supervisory employees were allocated only to those contracts benefited by the administrative/supervisory efforts of these employees, rather than to all contracts on which EDSG worked. (R. Meyers Decl., ¶¶ 8-9.)

21. Pursuant to federal regulations governing federal procurement activities, which require contractors to disclose to the government their accounting practices on a standard form called a "CAS Disclosure Statement," see CAS 351.60, EDSG included a description of this allocation system in a CAS Disclosure Statement submitted to the government for the Manufacturing Division, effective January 3, 1982, and for the Engineering Division (of which the SEL was a part), effective October 31, 1983.) (Declaration of Allan Brunmier ("Brunmier Decl."), ¶ 6, and Exhibits "A" and "B" thereto.)

22. These CAS Disclosure Statements disclosed to the government that supervisory labor that "benefited" specific contracts, but that could not practically be charged individually to such contracts, would be charged to "direct labor pools," and then distributed across the base of contracts charged by supervised individuals. The relevant language of these Disclosure Statements is as follows:

> 2.5.0 Method of Charging Direct Labor
> Various direct labor pools are maintained to collect labor charges that are impractical to individually charge to specific contracts but which clearly benefit same. The pools collect actual labor cost

> incurred. The pooled labor is applied to contracts based upon an appropriate base for the pool, *e.g.*, supervision labor is distributed based upon the labor distribution of supervised individuals. All pools are cleared annually.

(EDSG Disclosure Statement, attached as Exhibit "A" to Brunmier Declaration, at p. 71 (emphasis added).)

23. These CAS Disclosure Statements additionally described EDSG's criteria for determining whether costs would be charged directly or indirectly as follows:

> **3.1.0 Criteria For Determining How Costs Are Charged To Government Contracts Or Similar Cost Objectives.** The determination of whether a cost is charged directly or indirectly is dependent upon the purpose for which the cost is expended, i.e.:
>
> (1) If it identifiable to specific contractual performance, it is charged directly to the contract which created the requirement.
>
> (2) Costs incurred which are directly associated with contractual performance and impractical to charge directly to specific final cost objectives **[*i.e.*, a contract]**, are charged to intermediate cost objectives (such as a pool) for subsequent reallocation as direct charges to the specific final cost objectives.
>
> (3) If it is not identifiable to specific contractual performance and/or is necessary for maintaining and operating the general plant, the cost is charged indirectly.

(EDSG Disclosure Statement (October 1, 1984), attached as Exh. "C" to Brunmier Decl. at pp. 113-114.)

24. Taken together, the foregoing statements in EDSG's CAS Disclosure Statements put the government on notice that labs throughout EDSG, including the SEL, would charge supervisory labor into pools and then allocate these charges directly to contracts. (Brunmier Decl., ¶ 6; Slater Decl., ¶¶ 6-8; Murphy Decl. ¶ 15.)

25. Following submission to the government of the January, 1983 and October, 1983 EDSG CAS Disclosure Statement revisions, the Defense Contract Audit Agency ("DCAA"), the governmental entity charged with auditing contractor bid proposals, Disclosure Statements, and Requests for Payment, and the Air Force Plant Representative's Office ("AFPRO"), the agency responsible for overseeing contract administration at Hughes, each undertook a thorough review of the EDSG disclosures. (Slater Decl., ¶ 6; Brunmier Decl., ¶ 11.)

26. By statute, the DCAA and AFPRO were required to review and audit the CAS Disclosure Statements to determine (1) whether the Statement adequately described the contractor's cost accounting practices, and (2) whether the practices described were in compliance with the Cost Accounting Standards. (CAS 351.90; *see also* Hendricks Depo., pp. 58:20-59:18; Brunmier Decl., ¶ 11; Slater Decl., ¶ 5.) If the CAS Disclosure Statement was found to be adequate and compliant, as described, the contractor was advised by the ACO that the CAS Disclosure Statement has been accepted. *Id.*

27. In their reviews for adequacy and compliance, Dudley Slater, the DCAA Resident Auditor at Hughes, and Allan Brunmier, the Principal Administrative Contracting Officer at Hughes, focused particularly on the proposed "direct allocation system," which constituted a substantive change to the prior EDSG CAS Disclosure Statements. (Brunmier Decl., ¶ 6; Slater Decl., ¶¶ 6-8.)

28. In connection with his review, Mr. Slater met on more than one occasion with Al Kennedy, then the EDSG Assistant Group Controller, to discuss the implementation of the allocation system and the expected cost impact on existing contracts. (Slater Decl., ¶¶ 6-10).

29. The DCAA resident auditor specifically recalls considering, in connection with his audit of the CAS Disclosure Statement at issue, whether tasks commonly considered "indirect," such as completing performance evaluations or vacation schedules, could properly be charged "direct" through the proposed allocation system. Following discussions with the EDSG Assistant Group Controller, he concluded that including these charges would have a *de*

minimus effect on negotiated rates, and would improve administrative feasibility; he thus approved the use of direct pools for all charges. (Slater Decl., ¶ 7.)

30. As a result of his conversations with the Group Controller, his review of a "cost impact study" submitted by EDSG, and an independent review of the expected cost impact of the proposed change, Mr. Slater, the DCAA resident auditor, made a formal recommendation to Mr. Brunmier, the Principal Administrative Contracting Officer, that eligible employees be reclassified from "indirect" to "direct," and that the proposed allocation system be approved. (*See* "Report on Adequacy and Compliance Review of Disclosure Statement Revision," attached as Exhibit "F" to Brunmier Decl., pp. 184-185, *and* Slater Decl., ¶¶ 11-12.)

31. Based on this recommendation and on his own review of the Disclosure Statement, Mr. Brunmier determined as follows (Brunmier Decl., ¶ 12):

(a) that the direct allocation pool practice that had been disclosed was consistent with CAS 418, which provides for the designation of so-called "blanket costs," defined as costs that are accumulated in intermediate "cost pools" and then reallocated to contracts as direct costs;

(b) that the direct allocation pool practice that had been disclosed was consistent with the AFPRO's preference that costs be charged directly to contracts, rather than indirectly, whenever administratively feasible;

(c) that the direct allocation pool practice that had been disclosed would increase the accuracy of time-charging by supervisors, lab managers and their secretaries, because it would fairly allocate the labor costs of these employees across the totality of the contracts benefited, in direct proportion to the charges to each contract made by the supervised employees;

(d) that the direct allocation pool practice that had been disclosed would improve the consistency of time-charging, because it would eliminate

the arbitrary exercise of judgment of individual managers and secretaries as to whether particular tasks were properly charged as "direct" or "indirect" costs; and

(e) that the direct allocation pool practice that had been disclosed would not have any adverse cost impact on the government.

32. On May 1, 1984, Mr. Brunmier formally accepted the EDSG Engineering Division CAS Disclosure Statement, and all of its proposed changes, in a letter stating as follows:

> I have determined that these disclosure statements are adequate and in compliance with Cost Accounting Standards. . . . . It is my opinion the disclosed accounting changes do not result in any net increased cost to Government CAS covered contracts; therefore, no contract adjustments are required.

(May 1, 1984 letter from Allen Brunmier to Hughes Aircraft Company, attached as Exhibit "G" to Brunmier Decl.)

33. Thereafter, for each of the years alleged in the Complaint, CAS Disclosure Statements containing language identical to that quoted above were submitted to and approved by the government. (Brunmier Decl., ¶ 14, and October 1, 1984, December 30, 1985, December 29, 1986 revisions to EDSG CAS Disclosure Statement, attached as Exhibits C, D and E to Brunmier Decl. at pp. 110, 113, 159-160, and 172-173.)

34. The December 29, 1986 revision to the "direct labor pool" clause explicitly included "secretaries reporting to individuals who are direct" as among those to whom such clause applied. (*See* Exhibit E to Brunmier Decl., p. 173.)

E. RELATOR HAS INTRODUCED NO EVIDENCE TO CONTROVERT THE EVIDENCE INTRODUCED BY HUGHES

35. Relator has presented no evidence that SEL managers or secretaries charged in a manner inconsistent with what was disclosed to and approved by the government.

36. Relator's Complaint is premised on his allegation that Hughes' practice of charging the labor of SEL secretaries and managers directly to contracts violated Hughes' promise to the government set forth in its CAS Disclosure Statement. At his deposition, however, Haycock admitted that he had not even seen Hughes' CAS Disclosure Statements:

> Q: Mr. Haycock, you testified before that you had never seen Hughes' Disclosure Statement. . . . Is it still true that you've seen no Hughes' Disclosure Statements?
>
> A: That's true.

(Haycock Depo., Vol. II, p. 218:11-17 (Exh. W to Myers Decl.); *see also* Haycock Depo., Vol. I, p. 143 (Exh. X to Myers Decl.).)

37. Relator further testified that he was unaware of the nature of Hughes' "promise to the government" he alleges Hughes violated:

> Q: Now, with respect to the Disclosure Statement that you refer to in paragraph 5 of your complaint, would you state what you believe the promise that Hughes made to the government was that it violated as alleged in Paragraph 5?
>
> * * * *
>
> A: I don't know what they said but I'm referring to the practices for time-charging that Hughes would have represented to the U.S. Government in their Disclosure Statement that they were following.

(Haycock Depo., Vol. II, pp. 219-221 (Exh. Y to Myers Decl.).)

38. Relator testified moreover that he was ignorant of <u>any</u> disclosure to the government regarding any direct allocation system.

> Q: Are you aware of allocation systems of any kind with respect to any Hughes division or group that Hughes disclosed to the government?
>
> A: No.

(Haycock Depo., Vol. II, p. 269: 5-8 (Exh. Z to Myers Decl.).)

39. When pressed as to what he believed Hughes had represented to the government with respect to which employees were to charge their labor "direct" and which were to charge "indirect," relator testified that he did not know, and that, in any event, such a determination would be made by someone other than himself. (Haycock Depo., Vol. II, pp. 227-229 (Exh. AA to Myers Decl.).)

40. In addition, relator testified that he did not recall ever having seen any of the documents prepared by Hughes' finance personnel that indicated whether SEL employees should charge direct or indirect, and that the sole document on which his case was premised was a Hughes employee manual which provided a simplified overview of Hughes' timekeeping and accounting practices, was never disclosed to the government, did not purport to discuss the totality of Hughes' cost accounting practices, and was in no sense a "promise to the government" of any kind. (*Id.*; *and see* Simmons Depo., pp. 51-52 (Exh. BB to Myers Decl.); Declaration of Paul Hendricks ("Hendricks Decl."), ¶ 12.)

CONCLUSIONS OF LAW

1. The FCA creates liability to the United States for (1) the knowing presentation of a false or fraudulent claim for payment to the United States; (2) the use of a false record or statement to get a false or fraudulent claim paid or approved by the government; or (3) conspiring to defraud the government by getting a false or fraudulent claim allowed or paid. 31 U.S.C. § 3729(a).

2. The False Claims Act, 31 U.S.C. § 3729-3733, includes a "*qui tam*" provision which permits individuals with knowledge of the submission of a false or fraudulent claim for payment to the government to bring an action in the name of the United States and to receive a portion of the damages recovered thereunder. 31 U.S.C. § 3730. Such individuals are known as *qui tam* "relators." Black's Law Dictionary 1289 (6th ed. 1990).

3. Whether a claim for payment of labor costs is "false" cannot be determined by reference to the FCA, which

does not define what constitutes an allowable cost under government contracts, 31 U.S.C. § 3729; rather, such determination must be made by reference to independent statutes and regulations, such as the Cost Accounting Standards, which set the standards for entering and performing contracts with the federal government, and for accounting for costs under such contracts.

4. Hughes' cost accounting methods at issue cannot be "false" within the meaning of the FCA unless Hughes' actual cost accounting practices were secretly inconsistent with those disclosed to and approved by the government pursuant to the Cost Accounting Standards.

a) Cost Accounting Standards

5. The regulations governing federal procurement activities, which are set out in the Federal Acquisitions Regulations ("FAR") and the Cost Accounting Standards ("CAS"), require that contractors performing substantial work for the government devise and disclose to the government a body of "cost accounting practices" which will be used by the contractor in describing and accounting for the costs associated with performing government contracts. A "cost accounting practice" is defined by the regulations to be "any disclosed or established accounting method or technique which is used for measurement of costs, assignment of costs to cost accounting periods, or allocation of cost to cost objectives." CAS 331.20(k).

6. Disclosure of accounting practices is not required to be made for each contract executed between the contractor and the government, but rather is to be made on behalf of the contracting unit, for consistent application to all contracts performed by a given contracting unit. (CAS 351.40(b).) The contractor is required to have the CAS Disclosure Statement on file no later than the date on which the contractor submits a bid proposal to the government in an amount (not relevant here) above a designated threshold, and must act consistently with such CAS Disclosure Statement in every and any subsequently executed contract. (CAS 351.40(a).)

7. The intent of the Cost Accounting Standards is not to prescribe a particular method of cost accounting; rather,

the Standards' purpose is to insure that each contractor's cost accounting practices are disclosed and are consistently followed. (CAS 401.20.)

8. Consistent with this general purpose, the Cost Accounting Standards do not require any particular method of cost accounting, but rather require the contractor to disclose to the government its cost accounting practices with respect to the costs it incurs in the performance of its business (*i.e.*, labor, materials, depreciation, etc.), in order that the government may evaluate the consistency with which the contractor accounts for costs during all stages of contract proposal and performance. (CAS 331.60, 401.20, 401.40.)

9. Among the cost accounting practices that a government contractor must disclose to the government in its CAS Disclosure Statement is the criteria employed by the contractor for charging costs as "direct" or "indirect." *Id.*

10. The distinction between "direct" and "indirect" costs is premised on the recognition that while many costs ("direct costs") are incurred by a contractor for and benefit a contract, many other kinds of costs (*i.e.*, utilities costs associated with maintaining the plant, the salaries of high-level corporate employees who manage the business as a whole, etc.) are incurred for the benefit of the entire business organization, and thus cannot practicably be attributed to a particular contract or restricted group of contracts. Because of the impracticability of identifying these "indirect" costs to particular contracts, the Cost Accounting Standards permit contractors to separately account for "direct" and "indirect" costs.

11. As detailed in CAS 418, actual "direct costs" are charged directly to the contracts benefited by such costs. CAS 418.50(a)(2). In contrast, indirect costs are charged into "indirect cost pools," which include all indirect costs identified with the activity to which the pool relates, and then allocated on a *pro rata* basis across all of the contracts benefited by such efforts. An example would be an engineering overhead pool which would include the fringe benefits of the persons who worked in engineering, the rent or depreciation for their office space and equipment, the heat, telephone expense, etc. The costs collected in indirect cost

pools may be allocated across benefiting contracts in a variety of ways, as set forth more fully in CAS 418.50(b).

12. In addition to the two methods of cost allocation recognized above, the CAS recognizes a third method, termed "blanket costs," which provides for collection of "direct" costs in "intermediate cost pools" and the reallocation of such costs as "direct" costs. In this regard, the regulations provide:

> If a material amount of the costs included in the cost pool are costs of management or supervision of activities involving direct labor or direct material costs, resource consumption cannot be specifically identified with cost objectives. In that circumstance, a base shall be used which is representative of the activity being managed or supervised.

(CAS 418.40(c) and Preamble A thereto.) This highly technical language, in simple terms, means that where it is difficult to associate the cost of effort (*i.e.*, to measure "resource consumption") with the contracts that benefit from that effort ("cost objectives"), it is proper to accumulate those costs and spread them over the cost of the effort being managed (the "base").

13. Other than the general criteria described above, the Cost Accounting Standards do not instruct the contractor which costs are properly classified "direct" or "indirect"; rather, they require each contractor to develop and disclose to the government a set of standards by which the contractor will distinguish between direct and indirect costs -- *i.e.*, which costs the contractor can identify with particular contracts, and which they cannot -- and then to apply these standards consistently throughout the contracting process. (CAS 418.20.)

14. The primary focus of the Cost Accounting Standards, therefore, is to assure that the definitions employed are applied consistently. (*Id.*)

b) Truth In Negotiations Act

15. The Truth In Negotiations Act ("TINA") requires a contractor in certain prescribed circumstances to submit to

the government contracting officer "cost or pricing data" prior to the award of a negotiated contract or the pricing of a contract change or modification which exceeds a certain dollar threshold. 10 U.S.C. 2306(f)(1) (West's 1983). The statute also requires a contractor to certify that the data submitted is, to the best of its knowledge and belief, current, accurate and complete. "Cost or pricing data" is data which supports the costs which may or will make up part of the total cost of the contract and which, therefore, should be divulged in negotiating the contract. *See* FAR 15.801; *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306 (Ct. Cl. 1969).

16. TINA is a disclosure statute that requires a contractor to provide to the government such current, accurate and complete cost or pricing data that the contractor has in its possession. *M.R.S. Mfg. Co. v. United States*, 492 F.2d 835 (Ct. Ct. 1974); *Sylvania Elec. Products, Inc. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973).

17. Thus, only if Hughes failed to disclose its cost data, or if the cost data that was disclosed was inaccurate, incomplete or noncurrent could it have violated TINA. The government bears the burden of proving nondisclosure or use of inaccurate data by a contractor in negotiating a contract. *Sylvania Elec. Products*, 479 F.2d 1342.

18. Throughout the time period identified in the Complaint, Hughes was required to disclose to the government, and did in fact disclose to the government, the cost accounting practices that it would use in estimating and reporting the costs associated with its performance of government contracts.

19. These disclosures, which were approved by the cognizant Administrative Contracting Officer, informed the government that Hughes would charge the labor hours of managerial employees and their secretaries, such as those in the SEL, whose work benefited a discreet group of contracts, to a direct allocation pool, and would allocate the hours accumulated in such pool across the base of contracts benefited by these employees' labor.

20. The cost accounting practices disclosed to the government that are at issue in this action are consistent with

the Cost Accounting Standards and were found to be so by the government.

21. Moreover, even if the accounting practice of Hughes/EDSG had been inconsistent with the CAS or the FAR, (which they were not), the principle of equitable estoppel and the long-recognized rule of prohibiting retroactive cost disallowances would apply where there is such abundant, recurring evidence of the Government's knowledge, express approval by the contracting officer, acquiescence and the contractor's consequent reasonable reliance on the practice. Board of Contract Appeals and Court decisions consistently have held that the Government cannot retroactively disapprove an accounting practice where the Government previously approved or acquiesced in the practice and the contractor reasonably relied to its detriment on the Government's past conduct, even when the practice was improper, as was the case in *Litton Systems, Inc. v. U.S.*, 449 F.2d 392 (Ct. Cl 1971); *Falcon Research & Development Co.*, ASBCA 19784, 77-1 BCA 12312, *aff'd on reconsid.*, 77-2 BCA 12795; *Data Design Laboratories*, ASBCA 21029, 81-2 BCA 15190, *aff'd on reconsid.*, 82-2 BCA 15932; and *Colorado Dental Service*, ASBCA 24666, 82-2 BCA 15836.

22. Therefore, Hughes cost accounting practices cannot be the basis for a False Claims Act violation unless the manner in which Hughes accounted for its costs was inconsistent with its disclosure to the government set forth in its CAS Disclosure Statement.

23. Because the manner in which the SEL employees named in relator's Complaint accounted for their labor time is precisely consistent with this disclosure to the government, Hughes did not violate its "promise to the government" as alleged in relator's Complaint.

24. Because the manner in which the SEL employees named in relator's Complaint accounted for their labor time is precisely consistent with this disclosure to the government and because Hughes disclosed fully these practices to the government, Hughes has not violated either the False Claims Act or the Truth In Negotiations Act.

25. Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

26. When the party moving for summary judgment demonstrates that there is no genuine issue of material fact for trial, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)(*quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)). This standard requires that the non-movant not merely rest upon the allegations of its pleading; rather it must be able to point to specific facts establishing all essential elements of its claim. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510 (*citing First National Bank*, 391 U.S. at 290, 88 S. Ct. at 1593); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988).

27. The test for determining whether a genuine issue of material fact exists is whether the evidence is sufficient to sustain a verdict for the non-moving party. *Anderson*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. If the non-movant is unable to produce evidence that could lead a reasonable jury to conclude that it has satisfied its burden of proof, entry of summary judgment is appropriate. *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

28. A motion for summary judgment cannot be defeated by mere conclusory allegations of wrongdoing, but must be supported by factual data sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *Klopfenstein v. Pargeter*, 597 F.2d 150, 151-152 (9th Cir. 1979).

29. Hughes is entitled to judgment against relator with respect to relator's claims for violations under the False

Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because the relator has no facts to support his allegations or to controvert Hughes' evidence of no wrongdoing.

30. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes did not, knowingly or otherwise, present or cause to be presented to an officer of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

31. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes did not, knowingly or otherwise, make, use or cause to be made or used, a false record of statement to get a false or fraudulent claim paid or approved by the government.

32. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes has not committed any violation of either the False Claims Act or the Truth In Negotiations Act.

33. Hughes is therefore entitled to summary judgment each and every count of relator's Complaint.

34. (KN)~~Hughes is entitled to an award of sanctions against relator pursuant to Fed. R. Civ. P. 11 and 31 U.S.C. §§ 3730(d) for his filing of this legally and factually frivolous action.~~

Therefore, IT IS ORDERED, that summary judgment in Hughes' favor is GRANTED.

Dated: March 4, 1994 /s/ DAVID V. KENYON
Honorable David V. Kenyon
United States District Judge

Presented by:

McKENNA & CUNEO

By: /s/ SUSAN B. MYERS/for
Fred D. Heather

Supreme Court, U.S.
FILED
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No. 96-1399

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA ex rel. Don H. Haycock,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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REPLY BRIEF TO BRIEF IN OPPOSITION

Pursuant to Rule 22.5 of the Rules of the Superior Court of the United States, petitioner on behalf of the United States submits this reply brief addressed to arguments first raised in the Brief in Opposition submitted by Hughes Aircraft Company.

The purpose of this brief is to correct mistaken assertions presented in the Hughes Aircraft Company's Brief in Opposition; and, to affirm that the Brief in Opposition is further proof that there is no factual dispute, only a dispute as to the applicable law by which overhead labor may lawfully be charged directly to government contracts.

MISTAKEN ASSERTIONS

Specifically the Brief in Opposition makes the following mistaken assertions:

1. that, " . . . missing from the petition [for writ of Certiorari] was the District Court's order Granting Summary Judgment, . . . and several key portions of the District Court's order regarding the parties' motions for summary judgment . . . Thus Petitioner omits from the record the most critical portions of the order his petition questions." (page 2)

Petitioner's Response: Petitioner *did include* in the Petition for Writ of Certiorari (hereafter "Petition") the District Court's order Granting Summary Judgment as Appendix No. 3 (page App. 5). However, Petitioner did

not include irrelevant assertions regarding admonishment for failure to comply with certain local rules; and, an irrelevant footnote following Paragraph No. 1 regarding the trial court's reason for not acting on a motion to dismiss portions of the second amended complaint. The exclusion of both these provisions was indicated by omission designation. Irrelevant matter was also excluded in other Appendices in the Petition, as so indicated, to reduce the bulk of the Petition.

The brief in opposition further asserts that Petitioner omitted from this Summary judgment order, " . . . the most critical portions of the [summary judgment] order his petition questions."

Since this complete summary judgment order was included at page "1a" in the Appendix of the Brief in Opposition, the court will note that there were no "critical portions of this order" not included in the Petition. Hughes does not state what these "most critical portions" allegedly omitted are, because there are none.

2. That the declarations of the two government officials [Slater and Brunmier] " . . . reviewed and approved the CAS disclosure statements and its direct allocation pool charging system for the employees in question." (page 6)

Petitioner's Response: As the Petition states, Slater's and Brunmier's approval of the CAS Disclosure Statement and the direct allocation pool (system) is not disputed, is admitted, and is not an issue. By making this assertion Hughes in implying that these two government officials approved the contested labor-charging practice *that is* the ultimate issue of this lawsuit. As the Petition

proves, an examination of the declarations of these "government officials" reveals that they *did not* approve of the Hughes' labor charging practice. (*see* pages App. 37 and 64 in the Petition) The declarations of these officials unequivocally proved that charging the labor of overhead employees directly to government contracts must be in compliance with the mandated Federal Regulations expressed and referenced in their declarations. The Hughes practice disregarded these Federal Regulations as the declaration of Hughes Controller Robert Meyers and Hughes's attorney James J. Gallagher freely admit. (*see* pages 17 and App. 57 in the Petition) Hughes has also admitted this in its Brief in Opposition.

3. The Brief in Opposition mistakenly states that prior to the submittal of the declaration of Petitioner's expert witness, Peter Elliott, " . . . [petitioner] continued to rely solely on his own misguided interpretation of the government officials' declarations [Brunmier's and Slater's], the disclosure documentation submitted by Hughes, and the federal regulations and Cost Accounting Standard." (page 6)

Petitioner's Response: The record before both the trial court and the Ninth circuit are proof that Hughes' failure to comply with mandated Federal Regulations and Cost Accounting Standards was *not* first presented by Elliott's declaration. As Hughes acknowledges, the Federal Regulations and Cost Accounting Standards expressed and argued in Elliott's declaration *had been* previously presented and argued in written briefs to the trial court; and provided to the Ninth Circuit in petitioner's Excerpts of Records ("ER"): Specifically:

Federal Regulations (Cost Accounting Standards)	Excerpts-of-Record Pages
52-230-4&5	333, 337, 351, 357, 370, 391 and 393
351.60	216
331.60	237m, 237p, 237q, and 237v.
401.20	237n,
401.40	237n and 237v.
418	225

This is confirmed by the trial court's statement that: [Peter Elliott's declaration] " . . . consists mostly of a review of the evidence already presented to this court, . . . " (*see* page App. 14 in the Petition) Clearly, the trial court mistakenly concluded that mandated compliance with these Federal Regulations and Cost Accounting Standards was not relevant; and, that Item 2.5.0 in Hughes' CAS Disclosure Statement authorized this unlawful labor-charging practice in which Hughes unlawfully engaged. (*see* page App. 7 in the Petition)

4. The Brief in Opposition mistakenly states "[Haycock] never specifically identified either by name or by job category which employees supposedly were not covered . . . " (page 7)

Petitioner's Response: Names and job categories of numerous employees were identified to both the trial court and the Ninth Circuit in petitioner's Excerpts of Record. However, they were not included in this petition for two reasons: 1). petitioner and Hughes filed a stipulation with the trial court bifurcating liability from damages (Excerpts of Record, page 330); and, 2). the identification of these employees went to the issue of

damages. The trial court disposed of this case on the liability issue alone.

However, based on the discovered tab-runs of the Direct-Labor Allocation Pool (System), the following employees, and their overhead job categories, were identified to both Hughes, the trial court and the Ninth Circuit, in the Excerpts of Records ("ER"):

Secretarial Classifications: Jo Ann Cannon, Inez Santiago, Sandy Jacobson, Edith Chaplin, Jeanie Vaughn, Phyllis Jackson, Ann Campbell. (ER 237j)

Non-Technical Managers: Chas. F. Brown, Robert Hochhalter, Dave McEntytre, Nancy L. Richardson, Donald L. Chambers. (ER 237L). Also, Thomas F. Brands, James H. Brill, William T. Coffman, Jack J. Rafelson, Loren K. Glassen, David M. Goran, Jeffery B. McConnell, Robert E. McIntyre, Lavon P. Thorose, Linda L. Zeise (ER 241 to 246)

Business Administrators: Donald L. Nickles, Robert J. Kessler, E.J. Quay. (ER 244 & 245)

Training Supervisor: Nancy C. Norris (ER 245)

Personnel Administrator: Kimberle Perkins (ER 245)

Although this is not an exclusive listing, these are specific employees in overhead job categories, which is not disputed, whose labor is being charged directly to government contracts via the Direct Labor Allocation Pool, as direct labor, without being reclassified in compliance with the mandated Federal Regulations. Accordingly, their labor is being clandestinely charged to the government as direct labor, without notice to the government, in the manner described by Hughes Controller

Robert Meyers and attorney James J. Gallagher. *see* pages 17 & 57 in the Petition) This practice unlawfully subjects overhead labor to the 155 to 173 percent burden that should only be applied to direct labor; and, from which overhead labor is funded. (*see* page 8 of the Petition) This labor-charging practice is confirmed by Hughes in the Brief in Opposition.

5. The Brief in Opposition mistakenly asserted that: "The court also found that Hughes' evidence showed that its CAS Disclosure Statement properly disclosed its charging practice to the responsible government officials [Brunmier & Slater]" (pages 7 & 8)

Petitioner's Response: The declarations of Brunmier and Slater, and Peter Elliott's declaration, all mandate that the reallocation of overhead labor to direct labor *must be in compliance with the mandated Federal Regulations* as presented in the Petition and as a reading of these declarations will reveal. (*see* pages 14, 37 and 64 in the petition) Hughes did not comply with these federal regulations. There is no evidence in Brunmier's and Slater's declarations that they were even aware of the Hughes' labor-charging practice that violated these Federal Regulations.

6. The Brief in Opposition mistakenly states that, " . . . during oral argument before the Ninth Circuit, Mr. Haycock conceded [page 24 in the petition] that there was no evidence in the record (other than his expert's declaration which was not in the record below) to contradict the government officials' declarations." (page 10)

Petitioner's Response: The Court will note that this is not what was stated on page 24 of the Petition, as Hughes

claims. As stated on page 24, and throughout petitioner's opening brief, the declarations of Brunmier and Slater *are not disputed*. They confirm both the declaration of petitioner's expert Peter Elliott and the declaration of Hughes' controller Paul Hendrick, as expressed on this page during oral argument. They also confirm the applicability of the Federal Regulations presented to the trial court by petitioner prior to Elliott's declaration. The ultimate issue is that Hughes was not complying with the mandated Federal Regulations expressed in these declaration – *which Hughes has acknowledged*.

Further, Hughes has failed to produce any authority that supports its charging overhead labor directly to government contracts based solely on Section 2.5.0 in its CAS Disclosure Statement. (Brief in Opposition, page 5) The declarations of Brunmier and Slater do not support this practice, as an examination of their declarations will confirm. Even as a current Hughes employee, Brunmier would not make any declaration to the lawfulness of the their labor-charging practice.

7. The Brief in Opposition asserts that Petitioner improperly filed with the Ninth Circuit a bill for costs, claiming he was not the prevailing party. (page 10).

Petitioner's Response: This is a mistaken assertion; Petitioner was the prevailing party on a published opinion by the Ninth Circuit regarding rights of the government to intervene. Accordingly, the clerk of the court requested that Petitioner file a cost bill, which was done.

CONCLUSION

The Brief in Opposition conclusively affirms the issue this court is requested to decide. Specifically, whether Hughes may charge the labor of overhead employees directly to government contracts based solely on Item 2.50 in the CAS Disclosure Statement, without notice to the government and without any compliance with mandated Federal Regulations. This issue must be decided against Hughes. Hughes has cited no authority in support of this labor-charging practice. Conversely, all expert testimony cited on this issue hold that compliance with Federal Regulations is mandatory.

Accordingly, petitioner requests the court to find against Hughes on liability and mandate this case to the district court for proof of damages.

Respectfully submitted,

DON H. HAYCOCK,
Petitioner and Relator on behalf of the United States Government

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